156-177

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 216.

THE CORINNE MILL, CANAL AND STOCK COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM JOHNSON.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED JULY 8, 1891.

(14,727.)

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a In the Supreme Court of Utah Territory.

From the district court for the first judicial district, Weber county.

THE CORINNE MILL, CANAL AND STOCK COMPANY, Plaintiff and Appellant,
vs.
WILLIAM JOHNSON, Defendant and Respondent.

Transcript on Appeal.

Bennett, Marshall & Bradley, attorneys for appellant.

Marked: Filed Aug. 15th, 1890. Jos. P. Bache, clerk, by F. E. McGurrin, deputy.

(Service acknowledged.)

1 In the Supreme Court, Utah Territory.

From the district court for the first judicial district, Weber county.

THE CORINNE MILL, CANAL AND STOCK COMPANY, Plaintiff and Appellant,
vs.
WILLIAM JOHNSON, Defendant and Respondent.

Transcript on Appeal.

Complaint.

The plaintiff complains and alleges:

1. That it is now, and at the dates hereinafter named, it was a corporation organized, existing and doing business under and by virtue of the laws of Utah Territory.

2. That on the 8th day of June, A. D. 1883, the plaintiff was the owner, entitled to the possessin, and in the possession of section five, township eleven, north of range three west; section seventeen, nineteen, twenty-one and twenty-nine, in township twelve,
2 north of — three west; the west half of section thirty-three and the southwest quarter of section fifteen, township twelve, north of range three west, Salt Lake meridian, all of said property lying, being and situate in the county of Box Elder, in the Territory of Utah.

3. That afterwards, on the 8th day of June, A. D. 1883, while the plaintiff was so the owner, entitled to the possession and in the possession, the defendant, without the consent and against the will and the right of the plaintiff wrongfully took possession of the demanded premises, and hence, hitherto and now unlawfully withholds the possession thereof from the plaintiff, to his damage in the sum of five thousand dollars.

4. That the value of the rents, issues and profits of the said premises from the said first day of June, A. D. 1883, and while the plaintiff has been excluded therefrom by the said defendant, is one thousand dollars.

Wherefore the plaintiff prays judgment against the defendant:

1. For the recovery of the possession of the demanded premises.

1½. For five thousand dollars damages.

2. For the sum of one thousand dollars, the value of the said rents, issues and profits, and costs of suit.

EDWARD R. CHASE,
THOMAS MARSHALL,
Attorneys for Plaintiff.

August 16, 1884.

3 (Duly verified.)

Endorsed: Title of court and cause. Complaint. Filed August 19, 1884. A. C. Emerson, clerk.

Third Amended Answer and Cross-complaint.

(Title of Court and Cause.)

And now comes the defendant William Johnson, and leave of the court having been first had and obtained, files this, his third amended answer and cross-complaint to the said complaint filed against him in this cause, on the 19th day of August, 1884, and for answer says: He denies that, on the 8th day of June, 1883, or at any other time or at all, the said plaintiff was the owner of, or that it was entitled to the possession of the said land mentioned and described in the plaintiff's complaint, or any part or parcel of said lands.

Defendant denies that afterwards, on the 8th day of June, 1883, or at any other time or at all, the plaintiff was the owner of said lands or any part thereof. Denies that the said plaintiff was then or at any other time or at all entitled to the possession of said lands or any part thereof; and denies that said plaintiff was then or at any other time in the possession of said land or any part thereof. And defendant denies that heretofore or that he now or at any other time or at all wrongfully took or unlawfully or otherwise withholds the said premises or any part thereof from the said plaintiff
4 to *it* its damage in the sum of five thousand dollars or any other sum whatever or to the said plaintiff's damage at all. Defendant denies that the rents, issues and profits of said premises from the said 8th day of June, 1883, is one thousand dollars or any other sum or of any value whatever.

Defendant further answering, and for defence alleges that he and those under whom he purchased and through whom he claims and their vendors, have been in the actual, peaceable, exclusive and quiet possession of said lands and premises and held the same and every part thereof with all the improvements thereon open, notoriously

and adversely to the said plaintiff and all the world for more than fifteen years next last past and prior to the commencement of this suit, and said cause of action is barred by the statute of limitations as provided by section 178–179–180–181, pages 184–185, Laws of Utah, 1884, title 11, chapter 1. And defendant here specially pleads and relies on the statute of limitations as a complete defence of this action. And having fully answered all the allegations of said complaint the defendant prays hence to be dismissed with costs.

The plaintiff, William Johnson, who is defendant in the original complaint, now proceeds by way of cross-complaint and complains and alleges:

That the Central Pacific Railroad Company by reason of certain acts of the Congress of the United States and by virtue of which it assumed and claimed all the odd sections of the public land of the United States situated on each side of its line of road within the twenty-mile limit between Ogden City, Utah, and the city of San Francisco, California, not otherwise appropriated. That the
5 said railroad company issued public invitations, circulars, license, assurances and agreements and promises which it caused to be put in general circulation throughout the country, inviting all persons to come and settle upon, improve and cultivate all said odd sections of land, promising and assuring all such persons that when the said railroad company should put the said lands on the market for sale (in the event it became the owner thereof), that those having improved, settled on and occupied it should have preference in the purchase of the lands so occupied and improved by them, at the graded price which said company should place upon the said lands in the natural state, and without estimating any increased price because of the improvements, as the title and ownership of the improvements were to be those of the settler and occupant.

That under the said public circulars, promises, license and assurances, a large number of persons settled on and improved and cultivated numbers of the said odd sections of land. And these improvements and the equitable right to purchase said lands soon as the title thereto could be obtained from the United States, as aforesaid, by the common custom of those settling on and occupying said lands soon became to be recognized as property of value and vendible, and sold and conveyed, and the possession delivered from one to another, and which custom was known to and recognized by said railroad company, and never objected to by it.

That in pursuance of said public circulars, invitations, promises and assurances, one E. A. Stahn, as early as April, 1878, settled on and substantially improved and cultivated said northeast
6 quarter of section five, township eleven, north of range three (3) west, Salt Lake meridian, United States survey, and built thereon a substantial dwelling and other houses, and subsequently sold the same and delivered possession of said lands and improvements to his vendee, and by subsequent sale and delivery of possession the same became the property of this plaintiff, who has now had quiet peaceable, uninterrupted, open, notorious and adverse

possession of the same for more than fifteen years next before the commencement of this suit, continuously claiming said improvements as his own, openly, notoriously and adversely to the said railroad company and all the world, and the said plaintiff in the original suit.

Plaintiff has also had possession of and improved section 21 and 29 and the west half of section 33, in township 12, same range, and has held and possessed the improvements thereon, claiming the same openly and notoriously as his property, adversely to all the world, to said railroad company and to said plaintiff in the original suit, and which possession has been peaceable and unbroken for a period of fifteen years. The said lands are all in Box Elder county, Utah Territory, and within the twenty-mile limit of the said railroad and claimed by said railroad as lands contemplated in the said acts of Congress. That he has made lasting and valuable improvements on said lands, such as houses, stables, corrals, dug wells for irrigation purposes and affixed pipes so as to irrigate therefrom, planted and raised orchards of fruit trees of various kinds, cleared, fenced and cultivated a large portion of said lands and fenced other portions for pasturage of stock, and other improvements made and owned on said lands; that his im-
7 provements as aforesaid are reasonably worth and have permanently enhanced the value of the said lands to the extent of $8,000.

That prior to April 6th, 1883 said railroad company had rated said lands, forty acres of said northeast quarter of section 5, township 11, north of range 3 west, at $1.50 per acre, and the remainder thereof at $5.00 per acre; and said sections 21 and 29 at $1.50 per acre, and said west half of section 33, at $1.50 per acre for northeast quarter, $1.50, for northwest quarter of southwest quarter, $4.50; for southeast quarter of southwest quarter, $3.50 for the remainder of the said southwest quarter of section 33.

That on April 6th, 1883, said railroad company and said plaintiff in the original suit, entered into a contract in writing by which a sale and purchase of a large quantity of land or whatever interest or claim the said railroad company had therein was attempted to be negotiated by said railroad company to said Corinne Mill, Canal and Stock Company, and as a part and parcel of said written agreement the ownership of this plaintiff to his said improvements and his equitable right to purchase said lands at said rated prices was fully recognized by both parties, and to have pay for his said improvements or to have said lands, as aforesaid, was fully recognized and acquiesced in by the said plaintiff; that he had never prior to the bringing of said suit in ejectment been notified of any desire on the part of said railroad company or said plaintiff that he should comply with the terms of the said circulars, invitations, etc., and complete his purchase of said lands; nor was this plaintiff ever notified that the said railroad company or its alleged vendee
8 was in an attitude to make a good and valid title thereto to this plaintiff; nor did they or either of them ever notify him

that they or either of them would pay him for his said improvements thereon.

Plaintiff further alleges that by said agreement of April 6th, 1883, it was provided that if said Corinne Mill, Canal and Stock Company should fail or refuse to sell the lands so occupied and improved under said general circulars, invitations, promises and assurances of said railroad company to the settler and occupant, and pay for said improvements, and should fail to protect the equitable titles and equitable interests of the settlers and occupants and those who had settled and improved said lands in good faith, then the said railroad company reserved the right to sell and convey said lands at said graded prices to the occupants and holders of said improvements as soon as it should obtain title thereto from the United States. A copy of that part of the said agreement is already of the files of record in this cause and the same is here referred to and is made a part of this cross-complaint. Plaintiff alleges that the said Corinne Mill, Canal and Stock Company has wholly failed, refused and neglected to comply with any part of said agreement; on the contrary it has in violation thereof brought its ejectment suit to oust plaintiff therefrom and is now endeavoring through wrongful and fraudulent means to get possession of all of plaintiff's valuable improvements on said lands without paying him anything therefor and in violation of his rights and equities to purchase said lands when the said railroad company shall be able to make good and valid titles thereto. Plaintiff has never offered him any portion of said lands at the graded prices or any other price, nor to pay him anything for his improvements.

And plaintiff further alleges, that by virtue of said agreement of purchase and sale from said railroad company of said lands the plaintiff in the original suit is substituted to all the rights, duties and obligations to settlers and occupants that the said railroad company was, and that on this plaintiff complying with his part of the agreement contained in said circulars and invitations and paying the first instalment of the graded prices on said lands or offering or tendering the same, a court of equity will enforce a specific performance of said agreement and compel the said plaintiff in the original suit to convey all of said lands to this plaintiff as in equity and good conscience it should; and this plaintiff so insists and demands that it be compelled to specifically perform the same agreement that said railroad would have had to perform had said agreement not have been made; and that as soon as the titles thereto can be obtained that it be required to convey the same to this plaintiff. Whenever the said plaintiff in the original complaint can make a good and valid title to said lands to this plaintiff he is ready and willing to pay the first instalment of the purchase-money at the said graded prices. But in the event that the said Corinne Mill, Canal and Stock Company cannot make good and sufficient titles to said lands, then plaintiff insists that in equity he is entitled to a decree against said plaintiff for the full amount that his said improvements have permanently enhanced the value of the said lands, and that

said decree be declared to be a valid and subsisting lien on
10 said lands, and that in the event the same be not paid within a reasonable time, that said lands be sold or a sufficient quantity thereof to satisfy said decree, subject, however, to the paramount rights of the United States.

And plaintiff further insists that he is, by reason of the various permanent improvements made on said lands as above shown by virtue and in pursuance of said circulars, invitations, promises and assurances, a claimant for full value and that no damages would afford him an adequate compensation; and a money payment will not constitute him a sufficient redress.

While this plaintiff does not believe that at the time of the institution of the original suit, the said railroad company had any title whatever to any portion of the lands therein sued for, yet this plaintiff insists that by virtue of congressional legislation hereinbefore referred to, it had some equities therein and will eventually obtain titles thereto and when such titles shall have been procured then this plaintiff insists that the contract made by said railroad company, as aforesaid, with this plaintiff to which the defendant herein is substituted, is one which a court of equity will specifically enforce. If on the final hearing of this cause, it should appear that the defendant herein is not in an attitude to convey a good title to this plaintiff then it is insisted that the final decree provide for such conveyance when the same can be made. Wherefore, plaintiff prays to be allowed to file this his amended cross-complaint, and that proper process issue, and on final hearing he prays and demands judgment:

11 I.

That the said defendant, The Corinne Mill, Canal and Stock Company, be required to specifically perform the said contract as made by said railroad company with this plaintiff, and to execute a good and sufficient title to all and singular of said lands to this plaintiff, as soon as defendant obtains title thereto on this plaintiff paying the instalments as required by said circulars, etc.

II.

That the defendant herein be required by a decree of this court to do and perform all and singular the acts and agreements that the said railroad company would have been in equity required to perform in regard to conveying the title to said lands to this plaintiff, it having taken whatever interest therein that the said railroad company had with full knowledge of this plaintiff's equities and rights for a specific performance of said railroad company's contract to convey the titles of said lands to this plaintiff as shown in its contract with said railroad company.

III.

And plaintiff further prays in the alternative, that in the event the court should be of the opinion that this plaintiff has not shown

himself entitled to a decree of a court of equity for a specific performance of said contract, then he prays for a decree for the amount his said improvements have permanently enhanced the value of said lands and that such decree be made a lien on said lands,
12 and that the same be sold in satisfaction thereof, subject, however, to the paramount lien of the United States, if it should appear that it had such lien.

IV.

That plaintiff have all such further and different relief as in equity and good conscience he may show himself entitled and for general relief.

V.

That said plaintiff in the original suit be inhibited and enjoined in the further prosecution of said suit until the equities of this plaintiff can be heard and determined, and for perpetual injunction as to said suit in ejectment on final hearing hereof and for costs of suit.

GEORGE J. MARSH,
THOS. MALONEY,
Attorneys for Plaintiff.

(Duly verified.)

Endorsed: Title. Answer and cross-complaint. Filed March 30, 1889. H. H. Henderson, clerk, by A. H. Drake, deputy clerk.

(Title of Court and Cause.)

Verdict.

We, the jury empaneled in the above-entitled action find the issues joined therein in favor of the defendant and against the plaintiff; no cause of action.

JOHN GERMER, *Foreman.*

Endorsed: Title. Verdict. Filed February 26, 1890. H. H. Henderson, clerk.

13 (Title of Court and Cause.)

Judgment on Verdict, in Open Court, 26th Day of February, A. D. 1890.

This action came on regularly for trial. The said parties appeared by their attorneys, Bennett & Bradley, counsel for plaintiff, and Thos. Maloney and G. J. Marsh for defendant. A jury of twelve persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and on their oaths say:

"We, the jury empaneled in the above-entitled action, find the issues joined herein in favor of the defendant and against the plaintiff; no cause of action.

"JOHN GERMER, *Foreman.*"

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed, that said plaintiff take nothing by this action and that the defendant go hence without day, and that the defendant do have and recover from the plaintiff his costs and disbursements incurred in this action, amounting to the sum of — dollars.

Judgment recorded the 26th day of February, A. D. 1890.

Endorsed: Title. Judgment on verdict. Filed and entered February 26, 1890. H. H. Henderson, clerk.

14 (Title of Court and Cause.)

Order Extending Time to Serve Statement.

The jury heretofore empaneled in this cause again came into court and sat together and heard the testimony of witnesses to a conclusion, the arguments of counsel and the instructions of the court, to which instructions the plaintiff by its counsel duly excepted to each and all of said instructions, as given by the court, and retired in charge of a sworn officer to consider of their verdict, and subsequently they came into court and upon their oaths, say:

"We the jury empaneled in the above-entitled action, find the issues joined therein in favor of the defendant and against the plaintiff; no cause of action.

"JOHN GERMER, *Foreman.*"

Thereupon the court ordered judgment to be entered accordingly; on good cause being shown therefore, the court ordered that plaintiff be and it is hereby granted sixty days from this date in which to prepare and serve statement on motion for a new trial, and in the meanwhile, execution is ordered to be stayed.

Done in open court this 26th day of February, A. D. 1890.

H. P. HENDERSON, *Judge.*

15 (Title.)

Statement on Motion for New Trial and Appeal.

Appearances: Messrs. Bennett and Bradley, attorneys for the plaintiff; Messrs. George J. Marsh and Thomas Maloney, attorneys for the defendant.

This cause came regularly on for trial in the above court, on Tuesday, February 25th, 1890, at 10 o'clock a. m., before the Hon. Henry P. Henderson, judge, and a jury, and the following proceedings were thereupon had:

Mr. BENNETT: If your honor please, I offer in evidence certified copies of the articles of incorporation of the Central Pacific railroad; certified under the seal of the State of California, under date 30th day of July, 1885.

The COURT: Mr. Bennett, what is the date of the incorporation?

Mr. BENNETT: I think '62; I am not quite sure; February 18th, 1861.

The COURT: Well, if there is no objection it will be received.

Marked "Plaintiff's Exhibit 1 Y."

Mr. BENNETT: I now offer, if your honor please, certified copies of the amended articles of incorporation of the Central Pacific Railroad corporation; articles 8th of October, 1864, certificate 30th July, 1885, in connection with the former offer.

16 Mr. MALONEY: We object to this paper on the same ground. It is simply the articles—amended articles of the association and not the charter.

The COURT: What distinction do you make between the charter and the articles of association?

Mr. MALONEY: If I understand it, on filing the articles of association, there ought to be some certificate from the secretary of the State.

By the COURT: That depends upon the law of the State. I think it may be received.

Mr. MALONEY: We will take an exception.

Paper received and marked "Plaintiff's Exhibit 2 Y."

Mr. BENNETT: If your honor please, I now offer in evidence articles of association, amalgamation and consolidation between the Central Pacific Railway Company and the Western Pacific Railway Company, dated 22d day of June, 1870, certified under the great seal of California, on the 30th day of June, 1885.

Mr. MALONEY: The same objection.

The COURT: It may be received.

Received and marked "Plaintiff's Exhibit 3 Y."

Mr. BENNETT: I now offer a certified copy of the articles
17 of consolidation between the Central Pacific Railway Company, the Oakland & Alameda Railway Company and the San Joaquin Railway Company. These articles are dated 20th of August, 1870, and certified under date 3d of December, 1885; certified under the seal of the State of California.

The COURT: Mr. Bennett, under what name are they consolidated?

Mr. BENNETT: Under the name and style of the Central Pacific Railroad Company.

Mr. MALONEY: We object to it on the ground that it is irrelevant and immaterial.

Received and marked "Plaintiff's Exhibit 4 Y."

Exception.

Mr. BENNETT: If the court please, it should be noted at this point that there is no denial of the incorporation of the defendant, The Corinne Mill, Canal and Stock Company, and I now offer in evidence a contract or agreement made the 6th day of April, 1883, between the Central Pacific Railway Company of the first part, and Corinne Mill, Canal and Stock Company, a corporation organized and existing under the laws of Utah, embracing the lands here in controversy.

Mr. MARSH: It is a contract of sale?

Mr. BENNETT: Yes.

Mr. MARSH: You can enter a general objection to it and let it be received subject to that.

18 Received and marked "Plaintiff's Exhibit 5 Y."

Mr. BENNETT: In connection with that I desire to offer a document——

Mr. MALONEY: We object to it as incompetent and immaterial.

The COURT: That may be overruled and exception noted.

Mr. BENNETT: I offer the paper which I now hold in my hand being an award of the lands in connection with the contract, and embracing the same lands.

Mr. MALONEY: We object to the introduction of that instrument, on the ground that in the contract between the Central Pacific Railroad Company and the Corinne Mill, Canal and Stock Company, rights are reserved by the Central Pacific Railroad Company, and in their circulars which are issued—the right to purchase by actual occupants should be reserved by the Central Pacific Railroad Company, and if the Corinne Mill, Canal and Stock Company did not carry out the agreement to sell the lands to actual occupants, then the said Central Pacific Railroad Company reserved the right of itself.

The COURT: I think that would not be in objection to receiving the paper. If you prove that those lands are part of the rejected lands, it may raise a question of fact for the jury. It may be overruled and an exception entered.

Paper received and marked "Plaintiff's Ex. 6 Y."

19 N. P. ANDERSON, sworn for the plaintiff, and examined by Mr. BENNETT, testified as follows:

Q. Mr. Anderson, where do you reside, and what is your business?

A. My business is surveying; I reside in Brigham City.

Q. Do you know Mr. William Johnson, the defendant in this suit?

A. Yes, sir.

Q. Do you know were he resides?

A. Yes, sir.

Q. Where?

A. He resides partly on section 5 and partly on section 32, if my memory serves me right.

Q. What range, what township and range, if you know?

A. Section 5 is in township 11, range 3; section 32, is in township 12, same range.

The COURT: Now, which township is section 5 in?

A. Section 5? Township 11, range 3; section 32, township 12, range 3.

The COURT: Are those the lands described?

Mr. BENNETT: A portion of the lands described.

Q. How far from Corinne is the spot where Mr. Johnson resides on section 5 about?

A. Twelve miles.

Mr. BENNETT: If your honor please, in order to examine
20 the lands I now offer certified copies of a map showing the railway lands in Box Elder county.

Map received and marked "Plaintiff's Exhibit 7 Y."

The COURT: Just a moment, Mr. Bennett, do I understand correctly that it is section 5 and 32, section 5, township 11, range 3, and section 32?

WITNESS: Yes, sir; section 32.

The COURT: They are not both odd-numbered sections, then?

A. No, sir.

Mr. MALONEY: We object to any evidence in regard to section 32 because there is no claim of that land.

Mr. BENNETT: It is simply for the purpose of locating the party. I offer this map, certified by the Interior Department of the Government, and showing the limit within which the railway lands are located.

The COURT: Mr. Bennett, is that what is sometimes called a certificate of definite location?

Mr. BENNETT: Yes, I think so.

Mr. MALONEY: Subject to the usual objections.

Map and certificate received, marked "Plaintiff's Exhibit 7 Y." Exception.

21 Q. I would thank you, Mr. Anderson, to point out to the court and jury, if you are able to, by this map, about where Mr. Johnson resides; point out section 5 which you are now alluding to.

A. Here is the city of Corinne and here is section 5 (indicating).

By the COURT: Where did he say Corinne is?

A. Corinne City is here, marked out in blue letters, and here is section 5, township 11 north, range 3 west, the same range in which Corinne is located, at least partly; here is section 32, right above the township line, in township 12 north, and here is the line of definite location of the Central Pacific railway claiming several miles beyond.

Q. Well, is that—or let me ask you, isn't that the 20-miles line?

A. Yes, sir.

Q. To the north?

A. Yes, sir.

Q. So that section 5 is within the 20-mile limit?

A. Yes, sir.

Q. And about the ten-mile limit, is this the ten-mile limit?

A. Yes, sir.

Q. Mr. Anderson, have you ever made a survey of the lands in that locality?

A. Yes, sir.

Q. When?

A. I made a special survey of the lands in that locality on the 25th of February, '86.

22 Q. Was Mr. Johnson residing on section 5 at that time?

A. Yes, sir.

Q. Did you observe at that time any fences (you may lay the map on the judge's desk there)?

A. Yes, sir.

Q. Now, state to the court and jury what you observed and what the fact was in regard to fencing on section 5 or in that neighborhood.

A. There was a fence that enclosed part of section 5 which is referred to in this case, and that was only a part of a long line of fence, that started from the southwest side of the mountain and circled around, kind of a horseshoe curve, and terminated on some bluffs from the northeast part of the mountain.

Q. What sections were embraced or enclosed by that fence—embraced in or enclosed by that fence?

A. Well, I ain't so well prepared to state, because we drew that map at the time it was filed in the case, in this same case, and that map I don't know as it can be obtained today, I don't know how that is.

Q. I will ask you to look at the small map which I now show you, and if that refreshes your recollection, state what fences were placed there and what lands were embraced in the fences.

Map attached hereto and marked "Plaintiff's Exhibit S Y."

A. Yes, sir; the fence would enclose section 19. 19, township 12, range three; section 29, part of section 33, all of section 21, all of section 17; part of section 15.

23 Q. State the township and range.

The COURT: I wish you would just go over that again slowly, if you please.

A. Section 19, all of section 19, all of section 29, and part of section 33.

Mr. BENNETT:

Q. Can you state what part, how much of it and what portions of it?

A. Fully one-half.

Q. Being what quarters?

A. The west half of section 21 and about eighty acres of section 15, all of 17; township 12, range three.

Mr. BENNETT:

Q. I wish you would describe to the jury the character of fence and its construction with reference to the hillside or mountain or range.

A. The western terminus of the fence started out from the steep hillside, most equal to the bluff so as to prevent the cattle from working around the terminus of the fence, and then it followed around what might be termed the brow of the fence or mountains and terminated in the northeast of the smaller bluff and the fence was a post placed perhaps in places only two wires but mostly three wires.

Q. The fence includes all the land you are now describing to the court, does it?

A. Well, the fence is not closed, but it is expected to take advantage of the topography of the country, I suppose, so that the hills and the fence could not circumscribe.

24 Q. Was a portion of section 5 upon which Mr. Johnson was actually living embraced in that fence or not?

A. To the best of my recollection it was a special that circumscribed his improvements on section 5.

Cross-examination.

By Mr. MALONEY:

Q. What is your occupation, Mr. Anderson?

A. Sir?

Q. What is your occupation?

A. I am county surveyor of Box Elder county.

Q. What is that document which counsel handed you for the purpose of refreshing your memory?

A. That is a sketch drawn at the time the special survey was made.

Q. Who drew that?

A. Part of it is my work.

Q. Whose is the other part?

A. I don't know.

Q. There was even—what you call Government sections adjoining all those odd sections you speak of there?

A. Yes, sir.

Q. Isn't it true that that fence which you speak of running up that mountain there was built by Mr. Johnson for the purpose of keeping his horses there from trespassing upon his neighbors?

A. I don't know for what purpose it was built.

Q. Well, didn't he keep his horses in there?

A. Sir?

Q. Didn't he keep his horses in there?

25 A. Yes, it was built for the purpose of turning cattle and horses in either direction.

JAMES K. GREEN, sworn for the plaintiff, and examined by Mr. BENNETT, testified as follows:

Q. Mr. Green, where do you reside?
A. On the Malad river, Box Elder county.
Q. Do you know the defendant here, Mr. Johnson?
A. Yes, sir.
Q. Mr. William Johnson?
A. Yes, sir.
Q. Do you know where he resides?
A. Yes, sir.
Q. State to the court and jury—you are familiar with the lands where he resides and in that vicinity?
A. I am.
Q. Ask you to state to the jury what sort of land it is, whether agricultural, mineral, grazing or otherwise.
A. A part of this section where his house is on, where his residence is—is agricultural land.
Q. Do you know a line or lines of fence which he maintains, or which he has upon those lands?
A. Yes, sir.
Q. Now, describe to the jury, as well as you are able, those lines of fence.
A. It commences at the northwest, from a point on the high bluff, which is very steep; it then runs around in a circular form embracing all the lands which I have heard Mr. Anderson describe here, and terminating on the northeast at the rocky bluff on section fifteen.
26 Q. Section 15?
A. Section 15, township 12 north of range 3 west.
Q. Any other line of fence than that you observe?
A. Yes, sir; he has this—part of section 5—also enclosed separately from the other.
Q. Well, describe that to the jury.
A. That takes in a portion of the northeast legal subdivision of the section; the northeast quarter of the northeast quarter.
Q. That would be forty acres?
A. Forty acres, yes.
Q. Is that the subdivision on which his house stands?
A. That is the subdivision upon which his house is situated.
Q. About how much of the land enclosed in this fence is agricultural land?
A. Well, about the whole of this that he has enclosed in this section five.
Q. How much in all is enclosed in the fence and by the mountain ranges?
A. Oh, that I could not say exactly, how much it is, how large a quantity; I presume some thousands of acres.
Q. State as near as you are able how much.
A. Well, I could not say with any certainty how many acres there is in it; I never thought of that question, or I would have

figured it up how much it would be. It would be most impossible for one to tell unless they had it surveyed—that is for me.

Q. Are those lands in what is known as Corinne valley or in Box Elder county?

27 A. It is called Point Lookout.

Q. It is called Point Lookout in Box Elder county. How far is your residence from this land?

A. About four miles.

Q. How long have you resided in that valley?

A. About twelve years.

Q. Do you know what lands in that valley are worth for grazing purposes per acre or per hundred acres?

A. I only know from the rates that the Corinne Mill Canal and Stock Company has rented lands last season. It rented it then at $75 per section.

Q. $75 per section for one year, or for the grazing season?

A. For one season—one grazing season.

Cross-examination:

By Mr. MALONEY: Do you know whether any parts of this land described in this complaint is mineral?

A. No, sir; I know of no mineral land.

Q. Do you know what is the character of the mountain land?

A. Grazing land.

Q. Have you been over all the land mentioned in this complaint?

A. I think I have, sir.

Q. When?

A. Well, at various times during my residence up there. I have repeatedly passed over it.

28 Q. All the various sections and quarter sections that are mentioned here?

A. Oh, I could not say that I have been on every quarter section; I have on every section, I presume, that is mentioned in this complaint.

Q. Have you ever been on the southwest corner of 15?

A. Yes, sir.

Q. The west half of section 33?

A. How is that?

Q. The west half of 33?

A. Yes.

Q. And all the others?

A. And all the others.

Q. Explain to the jury how you can determine from traveling over this land, which is such a section or quarter section.

A. As I am well acquainted with the country out there and repeatedly help to survey a great deal of the land up there and am acquainted with all the corners of the sections in the vicinity.

Q. When did you help survey any of the land out there?

A. I assisted in surveying out there in '80, in '83 and in '86.

Q. Did you help survey all these lands mentioned in this complaint?

A. No.

Q. Do you know where the lines are?

A. Pretty much.

Q. Of all these sections and quarter sections?

A. Pretty much all the lines of the sections.

Q. And quarter sections?

29 A. Oh, no: I could not say as to quarter sections.

Q. Do you know, whether or not, there is any mineral over these mountain lands?

A. There has not been any discovered there.

Q. You don't know whether there are or not?

A. I have never heard anything about that. I have known of prospectors looking for it, but they had never found anything yet.

Q. That you know of?

A. That I know of.

Q. You don't know anything about what is the actual cash value of grazing lands there, except what the Corinne Mill Canal and Stock Company leased sections at for the season, do you?

A. That is all I know about it.

Q. Do you know for what purpose Johnson built those fences?

A. Pretty much; yes. I think he enclosed it for the purpose of grazing.

Q. Keeping his own horses from trespassing on other people's land?

A. I think not. Mr. Johnson's horses invariably run on the outside of the fences.

Q. Don't he have them enclosed part of the time?

A. Well, not that I know of.

Q. Have you ever been in the employ of the Corinne Mill Canal and Stock Company?

A. Yes, sir.

Q. Are you so employed now?

A. No, sir.

Q. About how long were you employed?

30 A. Employed by them the last time, last May, May, 1889.

Q. About how long have you been employed by that company altogether?

A. Well, I have never been employed by them regularly; most always done their work by contract.

Q. Have you been a witness in all other cases in the various litigations that they had in this court?

A. Well, in some of them; yes.

Q. Well, hav'n't you been a witness in about all of them?

A. No; I don't think I have been in all of them.

Redirect examination.

By Mr. BENNETT:

Q. Mr. Green, were you present on any occasion while Mr. Anderson surveyed any of these lands or any portions of it?

A. Yes, sir.

Q. Did you then examine, with Mr. Anderson, the fencing upon the land or upon any of the land?

Mr. MALONEY: I object to it as leading.

A. Yes, sir.

The COURT: Wait a moment, Mr. Bennett, that does seem to be a little leading.

Q. What, if anything, did you do in regard to examining the fencing upon this land, or any portion of it, in connection with Mr. Anderson?

A. Well, we started from the township corner and sur-
31 veyed up to the northwest terminus of the fence. Followed the fence from there to its terminus on the northeast—chained it the whole distance.

Q. What lands were embraced in that fence by sections and portions of sections designated in that way?

A. There was section 19 commencing on the west and cross-section 33 and 23, went over that; a portion of 15 and all of 19 and 29 in township 12, north of range three west.

Recross-examination.

By Mr. MALONEY:

Q. Is all this land you mention in township 12, north, range three west, Salt Lake meridian?

A. Yes, sir. Well, maybe a small portion of it at the extreme northwest that is in range 4. I am not positive about that.

Mr. BENNETT:

Q. What town do you say that is in—those sections are in?

A. Township 12.

Mr. MALONEY:

Q. I ask you if it was all in township 12. Now, which do you say, is it all in township 12 or some other township?

A. Most all in township 12, except it is in section 5, which is in township 11.

Q. Which township is 17 and 19 in?

A. Township 17?

Q. Section 17 and 19, what township are they in?

A. They are in township 12.

32 Q. The surveyor makes it in township 11—there is somebody wrong.

HENRY BARNES, being sworn for the plaintiff, and examined by Mr. BENNETT, testified as follows:

Q. Where do you reside?
A. Corinne City, Box Elder county.
Q. Do you know Mr. Johnson, the defendant?
A. Yes, sir.
Q. Do you know where he resides?
A. Yes, sir.
Q. Where?
A. Resides on what is known and called Point Lookout.
Q. On the east side of Corinne valley, as you go north?
A. On the north of the railroad, what we call north. The only house that is there, the house that he is living in, is situated on section 5.
Q. What township and range, do you know, Mr. Barnes?
A. Only from helping to survey it with Mr. Anderson.

Mr. MALONEY: I object; he only knows from information.

A. Well, I helped to survey it; I chained it and helped survey it.
Q. When did you assist in surveying it, Mr. Barnes?
A. I could not state the exact date, some time two or three or four years ago, without something to refresh my memory.
33 Q. You assisted Mr. Anderson, the witness who was on the stand, did you?
A. Yes; the witness and myself carried the chain.
Q. What time of the year was it, in the spring, summer or fall?
A. It was in the summer or late in winter; it was spring—it was bare ground.
Q. What is your business, Mr. Barnes?
A. Raising sheep.
Q. How long have you prosecuted that business, and where?
A. Well, it has been about—I think it was '83 that I entered in the business; first traveling around. The first three years was principally in Box Elder county.
Q. State whether or not you followed that business on any part of this land upon which Mr. Johnson lives.
A. Well, the first three — I was on it a good deal of the time, in the neighborhood of the land where he lives; on the land north and south, and east and west.
Q. At the time you assisted Mr. Anderson in making the survey you speak of, I will ask you to state to the court and jury, whether you observed fencing in the neighborhood of Mr. Johnson's house, and describe the fence, if you saw any.
A. I did observe a fence in the neighborhood of this house.
Q. Now, describe to the jury—it was there for what purpose? The purpose and character of the fence.
A. I was there for the purpose of surveying it. We commenced at the northwest part of the mountains, that is known as
34 Salt Creek valley, and surveyed the fence around this. It commences on a very steep bluff, considered impassable for

stock to go around it, and I guess it is, too: I should judge it was. I followed the whole line of fence around, and found the sections lines and corners for the purpose of knowing what sections they cross, clear around to where it intersected another bluff or mountain.

Q. Now, state to the court and jury, what sections, if you know, were embraced in that fencing on the mountain range, that furnished the northern boundary—the northern boundary—the northwest boundary it is?

A. Well, I don't know how I should state any more than we surveyed; we traced the township line and found out the township corner and traced each section up; but the sections have passed out of my mind a great deal, but I know personally of some few sections inside at the time, and at the time, of course, we traced out a great many, but now I don't recollect them.

Q. State any you recollect?

A. Well, one is 29, close to the lake that we traced. The lake makes me know that; section 5 that has the house on it, that makes me know that: section 33, with the springs on, that I know we crossed, and a little in 27 we crossed; I would not be positive about that. No, I think it was 27 or 28—I think it was 28, I would not be positive about that. I think we crossed 33, that is where the spring is. Yes, them I know and 19, I believe was inside the enclosure, but we didn't trace it all out, but I know exactly where it lays about. I know it should be in that survey.

Q. You are quite well acquainted with — section of the country, are you?

35 A. Very well acquainted with it, and know the land in it.

Q. Mr. Barnes, do you know the value of grazing for grazing purposes in that valley and in that neighborhood?

A. Yes, sir.

Q. I will ask you to state to the court and jury how grazing lands are let, whether by the year, by the month, or otherwise.

A. Well, in the vicinity?

Q. In that vicinity, I mean.

A. I believe a great deal of them give a man his stock a range for so much a year, on his land, or in his enclosure; generally about three dollars a year they charge where they keep them yearly in a large herd; of course, if they only have one or two, they charge more, but I am speaking of a large lot of stock.

Q. Yes, sir; three dollars to the animal.

A. Yes, sir; three dollars to the animal, as I know of my own observation that it takes about from 10 to 12 acres to carry an animal a year, and I arrive from that about what it should be worth, and I put that down and figure from 15 to 20 cents an acre on an average what it costs to run in their enclosure on their land.

Q. That would be 15 or 20 cents per acre for a year?

A. Per year, yes. The grazing year which would be the year, I think.

Q. That would include all the year, did they run the year around?

(No answer.)

Cross-examination:

By Mr. MALONEY: Do you know of lands being leased up there as high as 15 or 20 cents per acre.

A. What is it?

Q. Do you know of lands being leased up there as high as 15 or 20 cents per acre?

A. I know of lands such as this is, as high as 15 or 20 cents per acre—each acre.

Q. Is that customary up there?

A. No, but sometimes it is leased by the acre.

Q. The way that you base it is upon the letting of horses, cattle and sheep?

A. For grazing on the lands.

Q. For grazing on the land, is that the way you get at your calculation?

A. That is the way I calculate it, or it is the way I have calculated, that it costs so much for me or anybody to take our stock and graze them on the wild lands.

Q. Now, then, a contract of that character, the party takes these cattle and stock, or whatever it is, and looks after them, does he not, and turns them back after the end of the season, to the owner?

A. Yes, sir; he turns them back to the owner.

Q. And in this contract price, then is also included his services in looking after his stock, is it not?

A. Well, I suppose that is what he gets pay for; he ain't going to get paid for the wild grazing unenclosed lands.

Q. Do you know when Johnson built this fence?

A. I don't.

37 Q. Do you know anything about mineral being in the mountains there?

A. Never seen any.

Q. Don't know anything about that?

A. No, sir.

Court adjourned until 2 o'clock.

2 O'CLOCK P. M.

Jury called; all present.

E. R. HADLEY, sworn for the plaintiff and examined by Mr. BENNETT, testified as follows:

Q. Where do you reside, Mr. Hadley?

A. Corinne.

Q. What is your business?

A. Keeping feed and livery stable.

Q. How long have you resided at Corinne?

A. Twenty years.

Q. State to the court and jury whether you know the valley from Corinne north.

A. Yes, sir.

Q. Have you had occasion to procure pasturage for animals, or of renting pasturage to animals in that valley?

A. Yes, sir; I have rented pasturage; I have had animals to pasture; had them to take care of all the time most since I have been there.

Q. Ten years or more?

A. For twenty years.

Q. For twenty years? That is a long time back?

A. Yes.

Q. Well, state to the court and jury, whether you know what is a reasonable pasturage in that valley.

A. By the month, per head, or per acre?

Q. State, if you know, per acre.

A. I should say from 15 to 17 cents per acre.

Q. Per year?

A. Yes, sir.

Cross-examination.

By Mr. MALONEY:

Q. That is when a party takes animals to take care of?

A. That would be if you were to rent the land from them.

Q. Sir?

A. That would be if you was to rent the land from them, I should take it.

Q. Do you know the value of pasture land when it is leased?

A. Not any further than I have paid for pasturing stock.

Q. You confine your testimony, then, to what you actually paid yourself?

A. Yes, sir.

Mr. MALONEY: I move his testimony be stricken out.

The COURT: That would have some tendency, would it not, Mr. Maloney, to show what it is?

Mr. MALONEY: He may have paid a high price.

By the COURT: How is that?

Mr. MALONEY: He may have paid a high price.

The COURT: Well, he has stated, in answer to Mr. Bennett's question, that he knew what it was worth, and said what he had been in the habit of paying to have it done for himself.

Mr. MALONEY: Now, he says, he only knew that from what he paid himself.

The COURT: It is what it is in the market. I do not think it ought to be stricken out. Of course, the jury are not bound by what this man has paid, if they come to that. It is simply to take it for what it is worth.

Q. How far from Corinne was it you paid *for* 15 to 17 cents an acre?

A. We have paid on this range.

Q. Have you paid to the Corinne Company by the month for horses?

A. Have I to the Corinne Company—I never rented any land of them by the acre.

Q. They have taken care of stock?

A. They have mine.

Q. It was in the agreement that they should take care of it and return it to you?

A. They have never returned any stock to me, I always went and got it myself.

40 Q. Well, they took care of the stock while the stock was grazing?

A. Yes, sir.

Q. You paid 15 cents per acre?

A. No; I said I have never rented any land of them by the acre. I have always paid by the head, so much a month.

Q. Now, did you ever rent any land by the acre?

A. No, not by the acre. I have paid so much for certain pasturage.

Q. What part of the year?

A. Generally through the whole year; paid so much for the use of it a year.

Q. And you estimate that at 15 to 18 cents?

A. Yes, sir, taking by the year.

Q. What is land up there worth just at this time?

A. It is not worth much when the snow is deep.

ALEX. TOPANCE, sworn for the plaintiff, and examined by Mr. BENNETT, testified as follows:

Q. Mr. Topance, where do you reside now?

A. At Ogden.

Q. How long have you resided here and where did you reside before you came here?

A. Been here a little over a year—about a year and a half, and resided at Corinne before that.

Q. Before that; how long did you reside at Corinne?

A. From '68 up to the time I moved here.

Q. Do you know Mr. Johnson, the defendant here?

A. Yes, sir.

Q. Do you know where he resides?

A. Why, where he resides at the present time, yes, sir.

41 Q. Where?

A. At Point Lookout.

Q. Where is that with reference to Corinne?

A. About 12 miles up the valley, a little northwest.

Q. At what side of the valley, east or west side?

A. It is on the west side of Malad valley, or at a point you might say which is the center of the valley, including Salt creek.

Q. Do you know Mr. Topance, upon what sections his residence is—what section of land?

A. Yes, sir.

Q. What section is it?

A. It is on section five.

Q. And what township and range?

A. Township 11, 3 west.

Q. I would thank you to explain to the court and jury the enclosures, if any, on that section.

A. There is a portion of the northeast quarter and the northeast quarter of the section, I should judge, 35 or 40 acres.

Q. Enclosed?

A. Yes, sir.

Q. How enclosed?

A. It was enclosed by wire fence the last time I was there.

Q. When was that?

A. I was there this last fall, the fore part of the winter.

Q. That would be the fall of '89?

A. Yes, sir.

Q. Ask you to state for the court and jury, whether Mr.
42 Johnson has any other lands enclosed in that neighborhood, and if so, what land?

A. Yes, sir.

Q. What land?

A. Well, there is a big large enclosure that encloses several sections; that is the fence and the mound together.

Q. Now state, what sections are enclosed by his fence, and by the mountain ranges, on the west or northwest, if you are able to.

A. Well, it enclosed a portion of section 7–17, a little portion of 15, 19, 21, 29, a portion of 33, and a little corner of 31, in township 12 north of 3 west.

Q. State to the court and jury what knowledge you have of those sections, what familiarity you have with them.

A. I had them surveyed.

Q. When about?

A. They were surveyed in '83, the land that was purchased by the Corinne Mill, Canal and Stock Company from the Central Pacific Railroad.

Q. By whom were they surveyed?

A. For the Corinne Mill, Canal and Stock Company by Mr. Anderson.

Q. Mr. Anderson, the witness that was on the stand this morning?

A. Yes, sir.

Q. Were you present with him at that time?

A. Yes, sir; a great portion of the time.

Q. State whether or not you are familiar with those sections at that time.

43 A. Then I was not familiar with them, as I was after that. I could not locate the corners then.

Q. How long had you been familiar with the land before the survey made by Mr. Anderson?

A. I have been on the land off and on since '68.

Q. Now, I wish you would state more particularly to the court and jury the sections and portions of sections enclosed within the fence and the hill sides to the northwest.

A. To the best of my recollection, the fence on the northwest, a

portion of it goes into range 4, and crosses a little portion of section 25 in range 4.

Q. Crosses a little corner in section 5 in range 4; that would be west of range three?

A. Yes, sir.

Q. In the same township? Then it would be a township further west, which would be 12?

A. Four west, it is the west half of 33 which is enclosed, and the southeast quarter, I think, of 31. This, of course, shows Government land; 32 is in there; 20 and 28, and a portion of 16 inside of the enclosure and 18.

Q. Any other sections enclosed in the fence?

A. Oh, may be a little corner; I could not exactly state; the fence has no general direction.

Q. I see upon one of the maps introduced here a section of fence called the Toponce fence; explain to the judge and jury what that is, if you know.

A. Yes, sir; it is a fence that I ran here over the mountains to hold my stock above, and this fence up on the mound is a fence running north in connection with it.

44 Q. Did you ever, at any time, Mr. Toponce, representing the Corinne Co., make or give a lease to the defendant, Mr. Johnson?

A. I gave him a lease for the house, I think.

Q. About when was that?

A. I can't say; it was after the suit had been brough here in court, and the company had got a judgment against Mr. Johnson, and the marshal came up there to eject him off the premises, and it was bad weather, and I told him to protect his family, he could have the use of the house at a nominal lease.

Q. I didn't ask you what the lease was.

A. It was for the sum of a dollar.

Q. He was then on the premises, was he?

A. Yes, sir.

Q. You were then representing the Corinne Co.?

A. Yes, sir.

Cross-examination.

By Mr. MALONEY:

Q. Mr. Toponce, was that execution or writ of assistance in this case from this court?

A. Yes, sir; I believe it was.

Mr. MALONEY: I move that all be stricken out, your honor.

The COURT: What do you say to that, Mr. Bennett?

Mr. BENNETT: It don't change the fact, the fact as to the defendant taking a lease still remains.

The COURT: He says that the writ of assistance, the writ, was 45 issued, but it was bad weather, and out of consideration for his family, he gave him a nominal lease of the house. Mr. Maloney, I don't think I will strike it out of the record, but it can

be considered further on, what effect it will have, and whether it has any effect or not, I don't want to say.

Mr. MALONEY: I object to it and move it be stricken out.

The COURT: I do not know, but think it ought to be considered by the jury, as to whether it was done by coercion or not.

Q. Who was the marshal there that served that?

A. I think it was Mr. Steele and Whetstone.

Q. Steele and Whetstone?

A. I think those were the two men. It was Steele that told Johnson. I won't be positive, but I think they were both together.

Q. Well, the two marshals told them to stay there.

A. Well, they had a written lease from me.

Q. Wasn't it an agreement made with the marshals?

A. Yes, sir.

Q. Do you know whether or not other people's stock, the Corinne Mill, Canal and Stock Company's run in Johnson's pasture during that time?

A. I do not.

Q. Do you know anything about that?

A. Probably some stock pastured in there besides his; I can't say.

Q. Well, the land upon the bench there was not all unsurveyed public land?

A. No, sir.

46 Q. Isn't it today all unsurveyed public land?

A. No, sir.

Q. About how much was surveyed up there?

A. I think it is pretty near all surveyed at present.

Q. When was it surveyed?

A. What?

Q. When was it surveyed?

A. I think about three or four years ago.

Q. Do you know who surveyed it?

A. Mr. Fitzhue surveyed on top of the mountain; it is surveyed up to 17.

Q. Do you know whether those surveys were approved by the surveyor general or not?

A. No, sir.

Q. Don't you know as a matter of fact they were not approved?

A. No, sir.

Q. Never heard that?

A. No, sir.

Q. Do you know the purpose of Johnson running those fences up there to the foot of the mountain?

A. Do I know what?

Q. Do you know of the purpose of running those fences up there to the foot of the mountain?

A. I suppose to keep stock inside.

Q. You suppose to keep stock inside?

A. Yes.

Q. Where was it your fence and his join?
A. Upon section 15.
Q. Is that upon the mountain?
47 A. Upon the end of the mountain.
Q. Upon the end of the mountain?
A. Yes, sir.
Q. One question, Mr. Toponce, I want to ask you: ask you whether or not the Corinne, Mill Canal and Stock Company's stock run in Johnson's pasture?
A. I say I don't know; but some, I expect, will get in with other stock.
Q. You remember turning a lot of the company's sheep in Johnson's pasture at one time?
A. Probably some had been in Johnson's pasture.
Q. Do you — when and how many?
A. No, I don't.
Q. You don't know how long they run?
A. No, sir.

Mr. BENNETT: If your honor please, I offer in evidence a writ of possession, filed in this court on the 11th of June, 1886, and the return of the officer thereon.

Objected to as incompetent, immaterial and irrelevant. Overruled. Defendant excepts.

Mr. MALONEY: We object to that.
The COURT: What is it for, Mr. Bennett?
Mr. BENNETT: Only to show an acknowledgment of the plaintiff's right to this land, or part of it. I will read the return.
Mr. MALONEY: Wait a moment. I don't want the jury to hear it.
The COURT: Let me see, the situation is that a writ of
48 assistance was issued and executed and afterwards judgment was set aside.
Mr. MARSH: Yes, the writ was called back by the court.
The COURT: Well, now, does the record show that?
Mr. MALONEY: This recites the fact itself that it was recalled. I submit to the court that a return of an officer cannot make a lease.
The COURT: Well, Mr. Maloney, I won't refuse to receive it in evidence at present. We will see what it is followed up by.
Mr. MALONEY: Note an exception.

Writ received and marked "Plaintiff's Exhibit A. Y."

Mr. BENNETT: Mr. Toponce, state to the court and jury, if you are able to do so, how many acres of land were embraced within the fence or fences, made by Mr. Johnson and claimed by him?
Mr. MALONEY: I object to the question.
The COURT: What is the objection?
Mr. MALONEY: That there were a number of Government sections so they have no right——
49 Mr. BENNETT: I think counsel is right, and I will direct him only to the odd sections.

A. I would say between 34 and 3,500 acres, odd sections.

Q. Now, Mr. Toponce, do you know to what use Mr. Johnson kept that land—the land embraced in this fence?

A. Well, there was stock running in there—that is one thing that I know—for grazing purposes.

Q. For grazing purposes then?

A. Yes, sir, it was entirely.

Q. State, Mr. Toponce, if you know, what was the character of that land embraced within the fences, whether agricultural, grazing, mineral or otherwise?

A. I don't think there was any mineral there. It is just a mound and we call it mountain grazing land; it is bunch grass and all but section 5 is nearly all in the valley and farming land. And a little of section 33 is in the valley but it is not enclosed—a little portion of the section was on the outside of the fence.

Mr. BENNETT: Reserving the right to call Mr. Steele, I will close now, if that is not objectionable.

Plaintiff rests.

Motion for non-suit.

Overruled. Defendant excepts.

Mr. MALONEY: Now, if the court please, we move for a non-suit in this case, on the ground that the plaintiff has no right,
50 title or interest to the property whatever. They have in no way connected themselves with it.

The COURT: Mr. Bennett, I don't know as I understand as it is. How do you claim that you connect yourself with the title now.

Mr. BENNETT: We haven't made a detail statement of it, but I need only, I take it, refer to the statutes to connect ourselves with the title. I refer to the act of 1862, to the 12th Statutes at Large, 489.

The COURT: Those are the acts, railroad acts, granting lands to the railroad.

Mr. BENNETT: Yes, they are, and I have introduced in evidence the articles of incorporation, and the consolidation or amalgamation, as it is called, of the Central Pacific and the Western Pacific, which was recognized in the act of 1874, I think it is. That consolidation having taken place between those two companies, and the Corinne Company relying upon that consolidation and amalgamation, by the Central Pacific, and the contract from the Central Pacific to the Corinne Mill, Canal and Stock Company.

The COURT: Let me see, you have filed now—have you got the proper proof—yes, you have filed a map, but whether you have proved the map as being a map of definite location—you hav-n't proved, of course, any occupancy.

51 Mr. BENNETT: No.

The COURT: The act itself is a grant *in præsenti*. I was thinking that in this case that was tried here there was something further given to connect the party with it, but I guess it was the map of definite location. There were some steps taken in the land

office, was there not, in relation to those lands. I don't know but what that was shown from the land office. They had the land office, an officer from the land office up here, but I guess it was to show up definite location of the road.

Mr. MALONEY: They hav-n't shown any title to any section or quarter-section of this land. Now, they hav-n't introduced the act of Congress in evidence.

(Argues.)

The COURT: But, Mr. Maloney, those grants have been held to be grants *in præsenti*, and that the titles passes as soon as the acts were passed, or as soon as the map of definite location was filed.

(Argues.)

The COURT: Well, now, if it is not shown here, if any person shows that they have gone on this land and settled on it, they would have a better right until that is shown, because the act of Congress especially reserves the right. It is shown that Mr. Johnson actually lived on this land. It is already shown that this Mr. John-
52 son lived on this land. Now, unless the railroad company, within the time that was fixed by this act, convey the property, then of course, he would have the right to settle there, to pre-empt it, and could have a squatter's right, probably, under any of the United States statutes.

Mr. BENNETT: There is nothing here to show the date.

The COURT: I feel inclined to the idea, Mr. Bennett, that, under the act of Congress now outside of this question of recognition, that it is not shown—the conditions are not shown—that would show the title in the plaintiff. It seems to me that in proving title to this land, it is incumbent on the plaintiff to show the map of definite location, and when filed, and it is matter of affirmative proof upon their part, that those are not within the excepted kinds of land, that they are not mineral lands, and that they were not lands that were not within the pre-emption or homestead right, that that right had not been attached to them, and all that could be shown and would be shown if it is a fact — what the fact is would be shown by the record of the land office at Salt Lake, showing that they were open for entry.

Mr. BENNETT: I will take a ruling of the court.

The COURT: I feel inclined that way, Mr. Bennett.

Mr. BENNETT: I am not here to wrangle about it at all.

The COURT: Now, as to the other point that Mr. Johnson
53 has acknowledged the title of the plaintiff, I think that is a pure question of fact. It seems to me Mr. Johnson, of course, if he has leased those premises, if he has turned those people away, whatever the natural result of that would be, that he has acknowledged their title, and it was taken from him, but if, on the other hand, if that was got from him, by coercion, then, of course, it would stand for nothing. It seems to me that is the rule.

Mr. MALONEY: If the court will permit us, we will offer the record in evidence, showing that the judgement was set aside.

The COURT: Of course, if you propose to offer that record, and offer to show in connection with it that Mr. Johnson was coerced in making that lease, I think that should be received. I deny the motion for a nonsuit on the ground that I think a *prima facie* case has been made here.

To which defendant duly excepted.

Testimony for the Defense.

WILLIAM JOHNSON, being sworn in his own behalf, and examined by Mr. MALONEY, testified as follows:

Q. Mr. Johnson, do you remember about the deputy marshals, Mr. Steele and Mr. Whetstone, coming to your house with a writ of assistance?

A. Yes, sir.

Q. State to the court and jury the circumstances attending that visit?

54 A. Well, they came there, as I was starting away from home. They came there and they followed me a ways and I came back and Steele says what they was there for, to eject me and put me out of my house.

Q. State what took place between you and the two marshals?

A. Why, they followed me around nearly a whole day and threatened to take me on a bench warrant unless I gave up and made a compromise. Well, I came there and it was a contract, a kind of a lease for me to sign, but I didn't want to sign it, and told them I would not sign it, because it would go against me in this suit, and Mr. Steele pledged his word and honor to me that it could not go against me. There was a good deal of grain and hay there, and he said, if I did not sign that, that he would hire teams to come there and take all that grain off, and all the hay off.

Mr. BENNETT: Now, if your honor please, I move to strike the whole answer out.

The COURT: On what ground?

Mr. BENNETT: On the ground that it is not between the parties to this suit.

The COURT: Well it is between the parties that you have shown a *prima facie* case hereof attorning you by contract, and in doing that, of course, you claim by that contract, that was made by those parties, and that being so, they were dealing for you at that time.

55 (Argued by counsel.)

Mr. MALONEY: I desire to know what counsel relies upon, the lease made by Mr. Toponce, or with the deputy marshal.

Mr. BENNETT: I don't choose to say now what we rely upon. I object to this testimony as tending to impeach the return of an officer of this court.

The COURT: I think he may go on and take the testimony.

Q. Go on with the statement that you started with.

Exception.

A. Well, he told me, or he advised me, it would be better than to be turned out of doors, me and my family, and move all that material that was to move there, and he would have to hire teams to go to work, he said, and he said he would not prejudice the suit against me at all. He said he would see that it should not go or act as any bar to my right or title.

Q. Now, what was said in regard to the arrangement by you or Mr. Toponce, in regard to the lease?

A. None at all; had no talk with him.

Q. Never?

A. No, sir.

H. E. STEELE, sworn for the plaintiff, and examined by Mr. BENNETT, testified as follows:

Q. Mr. Steele, what, if any, official position did you hold in June 1886?

A. I was a deputy United States marshal.

56 Q. For this district?

A. Yes, sir.

Q. I will ask you to look at the return I now show you, and state whether you made it as deputy marshal.

Mr. MALONEY: Object to his answering that question, your honor. Whatever he did there, so far as the contract with Mr. Johnson was concerned, he did as the agent of plaintiff, and not as a return of the United States marshal.

The COURT: I think it is proper.

Mr. MALONEY: Exception.

Q. State whether or not you made the return, Mr. Steele?

A. Yes, sir; I made the return.

Q. Signed by you in your proper handwriting?

A. Yes, sir.

Q. Of what date?

A. 11th day of June, 1886.

Q. Did you hear the testimony of Mr. Johnson just now? Given on the stand?

A. Yes, sir.

Q. I will ask you to state to the court and jury what occurred between you and Mr. Johnson at the time you presented that writ?

A. Well, we had quite a chase to get any communication with Mr. Johnson up there; he got on a horse and ran all over

57 the hill. I guess it was from ten o'clock in the morning until two or three o'clock in the afternoon until I got to see him at all; that is, to get to talk with him.

Q. Who was with you, Mr. Steele?

A. Mr. Whetstone was with me.

Q. Also a deputy?

A. No, sir; he was not a deputy at that time.
Q. You did finally see Mr. Johnson?
A. Yes, sir.
Q. Where?
A. Well, I saw him at his house; near the house.
Q. At about what time of the day?
A. Well, when I first saw him, I saw him going away from the house just as I was driving up in that direction about ten o'clock; and, when he got back to the house with Whetstone (Whetstone went out and brought him back about three or four o'clock in the afternoon).
Q. Did you then have a conversation with him?
A. Yes, sir.
Q. You may state now what you said and what he said.
A. I had this paper. I stayed over night in Corinne, and Mr. Toponce told me if I could settle with Mr. Johnson; that is, get him to compromise the matter, and to give him thirty days to move off from the premises, why, to have him sign that contract. And I went out there, and he had a whole lot of hay and stuff on the premises, and I didn't want to take the time to move it all, and I went and saw him and wanted to get him to sign this contract here. When he came in I read the contract to him and told him to move all that stuff would take three or four men probably three or four days to do it and he would have to pay for it, and he had
58 better sign this contract, and that would give him twenty days to move off the premises; so, with that understanding he signed the contract. I forgot just what the contract was, but it seems to me it was thirty days.

Mr. MALONEY: Well, hold on now.
The COURT: It is no matter what you thought, Mr. Steele.

Q. And following that transaction, you made that return?
A. Yes, sir.

Cross-examination.

By Mr. MALONEY: Mr. Steele, you say you wrote that return—when was that writ withdrawn? You say this was on the 11th that you wrote this?
A. Yes, sir; I believe so; from the date there, that is all I can go by.
Q. Then, how did you happen to state that eight days previous, that would be on the second day of June, the court ordered the writ to be withdrawn?
A. I don't know. Let me look at it and I can probably answer that question.
Q. What is your answer to it, Mr. Steele?
A. Well, I suppose they did, that is all the answer I can give to it now.

Q. Then you had not any authority by virtue of that writ to get Mr. Johnson to sign that lease?

59 A. Well, that was signed prior to the time the writ was withdrawn; wasn't it a contract?

Q. Now, state it again to the court.

Mr. MALONEY: The question, your honor, is this, this is dated the 11th, now eight days prior to this, he said that this writ was withdrawn by the court. Now, the question is this, why would he make such a return if he knew that the writ had been withdrawn? The service was made and the contract signed on the 27th day of April, and the writ was served on the 27th day of April, and the return was made on the 11th day of June. On the 23d day he served said writ.

The COURT: What day was it withdrawn—the day the return was made?

A. On the 11th day of June, on the second day of June it was ordered withdrawn.

The COURT: That was after what took place up there?

A. Yes, sir.

Mr. MALONEY: We insist that he released the lease with it, whatever you might call the release.

The COURT: Well, now, let see a minute; this case was commenced in '84, and the complaint upon which this trial is to proceed—plaintiff being a corporation is now the owner of these lands; that on the eighth day of June, 1883, the plaintiff was the owner, entitled to the possession and in the possession of section 5, township 11 north, range 3 west; then it alleges further

60 that afterwards on the 8th day of June, while plaintiff was the owner and entitled to the possession, the defendant without the consent and against the will of the plaintiff wrongfully took possession of the premises against the will of the plaintiff. And then it alleged that he is now in the possession of the said premises. Now, it seems to me that long after this a writ and judgment was allowed. Now, Mr. Bennett, it occurs to me that this is wholly outside of the issue that is formed here. Suppose he had attorned to these parties, suppose he had actually given possession to those parties since that time—now the cause of action arose—it is not the cause of action as it is alleged here.

Mr. BENNETT: I would like to call the attention of the court to the answer upon which this is being prosecuted.

The COURT: According to the answer it is true it may have been filed since, but the complaint is proceeding upon—I don't know when this was filed; there is not anything to show.

Mr. BENNETT: It is March 30th, '89.

The COURT: Of course, if it is for the purpose of showing an admission of Mr. Johnson, that the title to these lands was in the plaintiff, that is all right and if it be submitted to the jury upon that question, as to whether by what he did or admitted that the lands belonged to the plaintiff and not to him, that would be

proper, because that would support the original allegation.
61 But as to the question as to whether the attorning gave up possession at that time, it seems to me it is one within the issue that is made by the pleadings.

Mr. MALONEY: We would ask the court to instruct the jury to return a verdict for the defendant.

(Argued by counsel.)

Mr. MALONEY: We move for a nonsuit. I ask the court to peremptorily instruct the jury to bring in a verdict.

Mr. BENNETT: I desire now to offer in evidence the complaint, and cross-complaint and answer, which I have numbered "2," and which was filed in this court on the 29th day of November, 1884.

(Attached and marked Ex. "G," "H" and "P.")

Mr. MALONEY: We object, your honor, it has been stricken out.

Mr. BENNETT: It is tending to show admissions; and also the cross-complaint filed here the 9th of May, '85; and also cross-complaint and answer filed on October 28th, '85.

Attached and marked "Exhibit X and Y," respectively.

The COURT: For the purpose of showing admissions?

Mr. BENNETT: For the purpose of admissions of title in the Central Pacific Railroad Company in the plaintiff.

Mr. MALONEY: Now, to all of these papers we object on the
62 ground that they are no part of this record, that they had been entirely disposed of. We except to the introduction of all the answers and cross-complaint, as on the ground that they are no part of this record; that they have been disposed of and stricken therefrom, and there is no admission in the answers or cross-complaints of any title in the plaintiff at the time they were written and signed.

Mr. BENNETT: If your honor please, I will undertake simply to state the point I desire to make: In this cross-complaint the two allegations are in substance that by certain arrangements between the Central Pacific Railroad Company and the defendant here, the defendant was entitled to a deed for this land, and that inasmuch as the plaintiff company, my client, has succeeded to the interests formerly held by the Southern Pacific Company, they ask for a specific performance to deed the land; an admission certainly that the plaintiff for the purpose of giving title, and——

(Argued by counsel.)

The COURT: Mr. Bennett, I have the impression that these answers can be received, but I don't think that the court can determine as a matter of law, that they are such acknowledgments of title of plaintiff that the court can determine that as a matter of law. I think it is wholly a question of fact for the jury to consider, just as though it were another paper introduced here, as though it were a letter written by him to somebody else.

Paintiff excepts.

63 Mr. BENNETT: I would like to recall Mr. Toponce.

Mr. MARSH: For what purpose?

Mr. BENNETT: We ask leave, if your honor please, to show that there was no pre-emption of this land at the time the Corinne Company claims to have the right to it.

Mr. MALONEY: We object to it on the ground that counsel has closed his case.

The COURT: I think I ought to allow the testimony.

Mr. MALONEY: Exception.

ALEX. TOPONCE, being recalled for the plaintiff and examined by Mr. BENNETT, testified as follows:

Q. Mr. Toponce, how early were you acquainted with the place on which Mr. Johnson now lives; section 5 and adjacent sections enclosed in that fence?

A. '69; 1868 and '69.

Q. State to the court and jury, if you know, whether at that time or subsequent there has been any settlements of the land by pre-emptors or homesteaders.

A. There was none; there was a filing on a portion of section 5, in the railroad land office by Mr. Stahn.

Q. Do you know, Mr. Toponce, whether that is the claim set up in the answers here and cross-complaint?

64 A. Yes, sir.

Q. You know that of your own knowledge?

A. Yes, sir.

Q. You may state to the court and jury how intimate you were with that ground from '69 down?

A. Well, I passed along by it nearly—well on an average of once a week anyway.

Q. State whether or not to your knowledge there was any person living on the land prior to the time Stahn had lived there?

A. No, sir.

Q. It was vacant land at that time?

A. Yes, sir; there was an old stage station on section 32 that has been there for years.

Q. That is a Government section?

A. Yes, sir; just above it—adjoining unto it.

Cross-examination.

Mr. MALONEY:

Q. Do you know what has been done in the Land Office by way of pre-empting or homesteading any part of this land in controversy?

A. I don't hear your question.

Q. Do you know anything what has been done in the Land Office by way of pre-empting or homesteading any part of this land in controversy?

A. No, sir; all I know that Mr. Stahn had filed in the C. P. railroad land office.

Mr. BENNETT: I offer the answer—the third amended answer and cross-complaint—of Mr. Johnson's and sworn to by Geo. J. Marsh as his attorney herein, and filed March 30, 1889, and signed by Mr. Marsh and Mr. Maloney as his attorneys.

65

(Attached and marked Exhibit Z.)

The COURT: I am not sure that is admissible.

Mr. MALONEY: They were offered before; we object to the introduction of each one on the ground—our objections are to the paper now offered in evidence.

The COURT: I think that should be received.

Mr. MALONEY: We will ask the court to instruct the jury to return a verdict for the defendant.

The COURT: I cannot do that. Mr. Bennett has raised the question as to whether there was an acknowledgment and whether — has proved the question, he has introduced some testimony there that can tell. He may be able to show the jury from that testimony conclusively of the question, which will satisfy them that he had admitted that they were the owners of this property as a matter of fact.

Mr. MALONEY: I understand the court has overruled the motion for a nonsuit, to which the defendant excepts.

Mr. MARSH: I understand also that the testimony in regard to the lease is to be stricken out.

66

The COURT: What lease?

Mr. MARSH: The lease that Mr.——

The COURT: Oh, yes; that question as to what the marshal has done under that writ is all stricken out.

Mr. BENNETT: We take an exception.

WILLIAM JOHNSON, recalled by the defendant and examined by Mr. MALONEY, testified as follows:

Q. Do you know when Mr. Stahn first went on that land?

Mr. BENNETT: I object to that as immaterial.

The COURT: What is the question?

(Question read.)

Mr. BENNETT: He did not derive title from Mr. Stahn, as far as this issue now on trial is concerned; it is simply an answer to the complaint, denying the title.

The COURT: But, Mr. Bennett, under the admission that you claim here, they say that they did claim from Stahn. I am inclined to think that you have got——

Mr. BENNETT: Exception.

67

A. It is sixteen years ago; May 17th, as near as I can recollect.

Q. State to the court and jury what improvements Mr. Stahn placed upon the land.

Mr. BENNETT: I object to that, if your honor please; it is immaterial.

The COURT: You may take the testimony.

Mr. BENNETT: Exception.

Q. Go ahead and state to the jury.

A. He had about forty acres of land fenced in and plowed; built a house—a rock house—dug wells, set out trees, cultivated the land and raised crops on it.

Q. How long had Mr. Stahn remained upon that land?

Mr. BENNETT: The objection will be the same.

The COURT: Same ruling.

Mr. BENNETT: Exception.

A. About nine or ten years ago; something like that.

Q. Did you purchase of Mr. Stahn?

A. Not directly.

Mr. BENNETT: I object to that.

The COURT: What is the object?

68 Mr. MALONEY: I want to show that he was rightfully there; that he had purchased all his improvements from Mr. Stahn.

The COURT: You expect to show this in parol then?

Mr. MALONEY:

A. Yes, sir.

Q. Did you ever have any written contract with Mr. Stahn in regard to these improvements on this land?

A. Only a verbal contract.

Q. Did you ever have any written agreement in regard to the land itself?

A. No.

Q. Now, state when it was that you went there.

A. It is eight years ago, I think, last fall.

Q. State to the jury all the improvements that you have placed upon the land, and designate upon which sections you made those improvements.

Mr. BENNETT: I object to that.

The COURT: The objection is overruled and an exception may be entered.

Exception.

A. I live on section five, and I had a good deal of fencing in there outside of section 5, plowed up the land and grubbed up the sage brush, cleared the rocks out when there was any rocks in the way of plowing, and got the land in a good state of cultivation. On section 5 and 33 this plowing was done.

69 Q. Well, what else? Go on and state.

Mr. BENNETT: If your honor please, I beg leave to strike out the testimony given by the witness in regard to 33; the question is in regard to 5. No, I will withdraw the objection.

A. I have a little improvement on sections 29 and 21.

Q. State what they are.

A. Well, sir, there is some plowing and a little fencing.

Q. If you made any fencing there, upon which section is it, and the extent of your fencing?

A. Right at the corner of 29 and 21; I then dug there and got a flow of water to water stock, and on the other sections I have been digging for water to water stock.

Q. Describe to the jury the house which you built on section 5.

A. It is a rock house, about 23 feet long, built in two rooms—upstairs—and a small room adjoining that into—unto one end.

Q. State the value of those improvements.

A. Well, I would consider the house worth a thousand dollars.

Q. Any other house built upon that land?

A. There is another rock building near by that; it was partly built when I went there; I finished it and put a roof on it.

Q. Well, what is that worth?

A. I don't think it could be built for less than five hundred dollars.

Q. Any stabling upon that section?

A. How?

70 Q. Any stabling upon that section?

A. Oh, yes; I have stabling, log stabling.

Q. What is that worth?

A. I consider that worth three hundred dollars.

Q. Have you any barns?

A. Well, the stable and barn is combined you might say.

Q. Have you any wells?

A. There is two good wells.

Q. What are they worth?

A. It cost fifty dollars a piece for a man to dig them.

Q. What about the orchards?

A. The orchards—I had planted a good many trees there, but they are mostly died out since I planted them.

Q. State what they are worth; those that are there now.

A. The value of what is left would not be amounting to anything much.

Q. What is left?

A. I have planted quite a number.

Q. Have you laid any iron pipe?

A. Yes, sir; from one of the wells I have laid pipe.

Q. About how many rods?

A. I have taken some pipe up since it was first put down; I guess there is about five or six rods.

Q. What was it worth?

A. Oh, a man could not dig a trench and put the pipe in there for less than a hundred dollars.

Q. State about corrals and gates and stock yards.

A. I have got corrals and gates made out of timber.

71 Q. What are they worth?

A. About two hundred dollars, corrals, and gates and stock yards, etc.

Mr. BENNETT: I hope that the reporter will note that all testimony in regard to improvements is under objection.

Q. State whether or not you have a number of wire fences and of different kinds.

A. We have some wire fence and some pole fence; some wire fence and poles and wires.

Q. What is the extent of those fences now?

A. I would consider it worth on section 5—all fencing? Altogether there would be six miles of wire fencing.

Q. What is that worth, the whole amount?

A. Worth a hundred dollars per mile.

Q. Ask you in regard to section 33, township 12 north, range 3, thirty-acre tract there, what improvements are on that, if any?

A. Section 33?

Q. Yes, sir; township 12 north, range 3.

A. There is about thirty acres plowed, sage brush dug out, rocks cleared out from it and put in good shape for farming, and there is a fence—has been a fence around it, but pretty badly down now; that is the wires and a good many of them have got broke.

Q. Well, what is it worth?

A. Well, around the enclosure, we enclosed that in—there would be about three miles of wire fencing; I would consider it worth three hundred dollars.

72 Q. When did you make those improvements, Mr. Johnson?

A. I made them since I lived there, prior to July, 1884.

Q. Sir, what?

A. Prior to July, 1884, when this complaint was filed; yes, sir.

Q. State whether or not you expected to get title to this land when you made those improvements?

Mr. BENNETT: I object to that, if your honor please.

The COURT: I don't see how it is of any account.

(Argued by counsel.)

The COURT: I don't think as the case stands now that that could be given, unless you are prepared to show who he holds under. If he held under the railroad company, why then——

Mr. MALONEY: Well, at that time, this lands was not surveyed and we don't know whether the section was odd section or even sections. If the improvements were on even sections, why, then, we expected to get title from the Government; if the improvements were made on odd sections, then, of course, from the railroad company if they had obtained title from the Government.

The COURT: I think it is immaterial.

73 Mr. MALONEY: Exception. We offer it now, if the court please, for the purpose of showing the good faith of the defendant in making the improvements.

Mr. BENNETT: Same objection.

The COURT: I think it should be sustained.

Mr. MALONEY: We will take an exception.

Mr. MALONEY: Mr. Johnson, do you know whether the lands upon the side of the mountain there have been surveyed or not?

Mr. BENNETT: I object to that as immaterial.

The COURT: What is the object?

Mr. MALONEY: They are setting up title here to a lot of this land, as I understand it, and we can show by this witness as a matter of fact, that neither the Government nor the Central Pacific Railroad Company, nor the Corinne Mill Canal and Stock Company have ever made any surveys of this land down there.

The COURT: Is it for the purpose of showing that he is not on an odd-numbered section?

Mr. MALONEY: He lives upon section 5. Now, they are suing for odd sections that is upon the mountain or bench rather.

74 Now, we can show that the Government, nor the railroad company, nor the plaintiff has ever made any surveys.

The COURT: Mr. Maloney, the title in the railroad company does not depend upon its being surveyed, if they are on the odd-numbered sections.

(Argued by counsel.)

The COURT: If that is what you are doing—simply showing that he is not on an odd-numbered section—you may take the testimony, for the purpose of showing because it is not surveyed, that he has a right to go on it and be on it, you can do that.

Mr. MALONEY: Answer the question, Mr. Johnson.

A. They was through that country surveying last summer—late in the summer.

Q. What lands were surveyed and who surveyed them?

A. They was trying to get a correct survey then.

Q. Who were they?

A. It was Fitzhugh and a man from Missouri.

Q. Were they Government surveyors?

A. This man from Missouri was a Government surveyor, and Fitzhugh I understand was a Government surveyor.

Q. Now, what lands did they survey?

A. They surveyed from section 5 through back north to the mountains there.

Q. Did you know whether they were there and reported to the Department of the Interior or not?

Q. Mr. Johnson, I will ask you how long your horses, you

75 remember of that—were attached by plaintiff, The Corinne Mill, Canal and Stock Company?

Mr. BENNETT: We object to that.

Mr. MALONEY: I will state to the court the object of it, that about a year before, as I understand the fact to be, they entered suit, this Corinne Mill, Canal and Stock Company, and had a number of this defendant's horses under attachment, and they allowed them to graze on this land that they are now asking us to pay for.

The COURT: I think you may take the testimony; go on and

state what the facts are about that matter: how long and how many.

Plaintiff excepts.

A. They had all I had—all horses I had was under attachment, and the attachment, I think, was held there a year before it was dissolved.

Q. Where did they herd them at that time?

A. They did that on the range.

Mr. BENNETT: Same objection.

The COURT: Same ruling.

Mr. BENNETT: Exception.

Q. On any of the land in controversy here?

A. Yes, sir; they held them on the mountain range.

76 The COURT: Mr. Johnson, did they levy upon one-half of your horses, take them away from you at all of your herd—take them away, or did they simply levy on them and hold them?

A. They levied on the whole number—my entire herd.

The COURT: And put a man in charge of them?

A. He boarded there with me.

The COURT: Now did they take possession—take them away from you, or did they allow them to run just as they did—having a man in charge to hold them on the range.

(No answer.)

Mr. MALONEY:

Q. He had possession?

A. Yes, sir.

Q. How many horses did you have at that time?

A. There was about three hundred, as near as I can recollect.

Q. Mr. Johnson, what was your object in running this wire fence there—platted up the mountain?

A. At the time I settled there, there was a good deal of farming done between the mountain and the Malad river, and I wanted to hold my stock on the mountain and this land in the plat is in the farm.

Mr. BENNETT: If your honor please, I object to this, and move to strike out the answer.

77 The COURT: They make no claim to the given number; I think that is not material.

Mr. MALONEY: Exception.

Q. Now, I will ask you Mr. Johnson, if the Corinne Mill, Canal and Stock Company have ever used any of the land that was in this enclosure in the section set forth in this complaint, or one-half section.

Mr. BENNETT: I object to that, your honor.

A. They have always.

Mr. BENNETT: I object to that as immaterial.

The COURT: Well, Mr. Bennett, if they had use of it. All this testimony is admitted subject to objections.

Mr. BENNETT: I think my objection is not well taken.

Mr. MALONEY:

Q. Go on; answer the question.

A. They have always had horses amongst mine.

Q. Anything else?

A. They have put sheep in.

Q. How many, when, and how long did they run?

A. There has not been a summer but what they have had sheep in on the mountain.

Q. Well, how many; explain to the jury here.

78 A. Well, they have large herds of sheep.

Q. Well, about how many, and how long did they run?

A. Well, the sheep would generally—counting sheep by the herd—it was a large number of sheep, and they have run there time and again, summer and fall—the sheep belonging to this company. There was a big large herd up in there last spring, and were there for a long time. They were camped and held pretty much on section 21.

Q. Any other sections?

A. Well, they scattered out all over the country there.

Q. Government lands? Were they held on all the sections mentioned in this complaint, you know what these lands are?

A. Yes, sir, they were—that was on all of them.

Q. Now, about how many horses did they hold on these sections of land mentioned in this complaint, and how long were they there?

A. Three hundred head was held there a year.

Q. What year?

A. I think it was about three or four years ago, between three and four years.

Q. Since the filing of this complaint?

A. Since the filing of this complaint, yes, sir.

Q. You are speaking of this company—do you mean the plaintiff in this action, The Corinne Mill, Canal and Stock Company?

A. Yes, sir.

Cross-examination.

Mr. BENNETT:

Q. When did you go upon this land, Mr. Johnson?

79 A. About eight years ago last fall.

Q. Don't you know just when you went there?

A. I haven't the date right here; I can find it, though.

Q. About when—what month?

A. It was along in the fall when I first moved there, settled there commenced living there.

Q. Of what year?

A. I think it was in the fall of '81—'81 I believe.

Q. Quite sure about that?

A. Oh, I could refresh my memory here and tell you exactly.

Q. Are you quite sure you went there in the fall of '81?

A. I think it was '81; might possibly be '82.

Q. You say you have six miles of wire fence?

A. I think it about that.

Q. I will ask you to state to the court and jury where that fencing is.

A. There is one line of fence that runs in a northeast direction.

Q. From where to where?

A. I bought some improvement on section 28.

Q. I don't care about that—wait a moment—from where to where does this fence extend?

A. It extends from 33—section 33 to section 15.

Q. At what point in 33 does it start?

A. It starts about the middle of the section.

Q. As to any quarter-section post?

A. I am not so familiar with the quarter-section posts; I know all the section posts.

80 Q. Well, if it starts then at section 33, how far from that corner to the other corner of the section?

A. It is about a quarter of a mile east of the southwest corner of the section—a little over a quarter.

Q. Now, starting from that point, in what direction is the fence built and how is it maintained by you?

A. It is built northeast.

Q. Northeast—does it follow the section lines from the point where it starts?

A. No, it simply follows along the lower part of the hills.

Q. How far? Does it run on that section?

A. 33?

Q. Yes.

A. It runs along until it gets off on the northeast side.

Q. Well, how far unto section 33?

A. About three-quarters of a mile.

Q. Upon what section does it end?

A. 15.

Q. Does it run entirely across 15? Does the fence run or exist entirely across 15?

Q. Across what?

A. 15.

Q. Section 15?

—. ——.

A. No, sir.

Q. How far does it run?

A. It only extends some little ways on 15.

Q. How far?

A. I am not very familiar with the lines—I could not say just how far.

81 Q. Well, about how far?

A. No.

Q. About how far?
A. Oh, maybe a quarter of a mile.
Q. On 15?
A. Yes.
Q. Then it leaves that section. What section does it continue to the northeast?
A. It stops right there.
Q. What is the nature of the ground, where the fence commences—on section 15?
A. It is very near level.
Q. It is not at the hillside?
A. No, sir.
Q. Do you connect with any other fence there?
A. Yes, sir.
Q. Whose?
A. It belongs to the Corinne Mill, Canal and Stock Company, I think.
Q. Where does that fence extend, with which you connect?
A. It extends from the Malad river west—pretty near west.
Q. On what section is it built?
A. It runs across section 15.
Q. Your fence runs on section 15?
A. Yes.
Q. Then where does it go?
A. Well, my fence——
Q. No, this continuing fence.
82 A. Oh, that runs west, up on the mountain.
Q. Well, where and upon what section?
A. I could not tell you.
Q. You do not know?
A. I am not familiar with the section lines up there.
Q. How long has that fence of the plaintiff been there?
A. It has been there about sixteen years.
Q. How long has it—how far does it extend?
A. From the Malad river?
Q. I mean beyond your fence, where your fence joins it.
A. About a mile and a half.
Q. To what point, on what section?
A. I think it was stopped on section 16.
Q. What section or sections does it cross, does it exist upon?
A. Well, it would run across 15, a part of 15 and on up over 16. I think it is somewhere near on 16.
Q. Where does it end?
A. Yes; that is where it ends.
Q. On 16, what is the nature of the ground where that is?
A. It is kind of a flat mountain country.
Q. Well, it is in the hills and not on the flat?
A. No, sir.
Q. How?
A. No, sir; it is not on the flat.
Q. In the hills?

A. It is a real hilly country.

83 Q. Have you described now to the jury, in answer to my question, your whole six-mile wire fence?

A. No, sir.

Q. Where have you other fences?

A. I have a good deal of fencing around my farming land, and then I have got another line of fence that runs west where my farming land is.

Q. Describe the fence around your farming land. What section or sections is that on?

A. I have got some on 5, some on 33, some on 28, and some on section 32.

Q. Any on 27?

A. If it is, it is very little. It may run across one corner of 27, keeping off the hill. I built a fence right along the point of the hill—there may be a few rods on 27, one corner.

Q. Where does the eastern end of that fence exist?

A. Just north of the fence.

Q. Of one you have just now been describing?

A. It connects onto my farm.

Q. Where on your farm?

A. On 33.

Q. 33?

A. Yes; I have some directly north of the house or corrals. The farm lies between the end of my fence and the house, and I have some farming lands lying in there.

Q. Now, this fence commences then on 33—this line of fence—does it?

A. Yes, sir.

Q. And runs in what direction—the line of it?

84 A. It runs across 33.

Q. And runs across 28?

A. And runs across 22 and stops on 15.

Q. On 15?

A. Yes.

Q. What is the distance between the two fences you have now described and the two main lines of fence?

A. About three miles—a little over three miles.

Q. What sections are embraced in the three miles?

A. There is part of 33, 28, 22 and a small part of 15.

Q. Is that all?

A. That is all—in that line of fence.

Q. How much land is there inside those two fences between the two enclosing both?

A. There is no enclosure there. They are just merely a straight line of fence.

Q. How is that?

A. They are just merely a straight line of fence. You could not enclose land with a straight line of fence.

Q. Are the two lines of fence that you have now described continuous—do they form one line?

A. They are just one line—one straight line of fence that goes from my farm and runs north.

Q. Did you have any other land fenced in that neighborhood?

A. There is one goes west of my farm.

Q. Well, now, the two you have described now are on the north and west?

A. I have only described one of those on the north.

Q. Well, now describe the one on the other side.

85 A. Yes; it commences where my farm is on the—well it commences on 32, and it runs across the corner of 33 and stops on section 30. I don't know just where.

Q. On section what?

A. 30; somewheres near there; I have no surveyor's chain out there and I am not very perfect on those miles and quarter miles corners; I know where most of the section corners is—most of them——

Q. What is the nature of the ground at the west end, in the last fence you have described?

A. Very rocky.

Q. On the hill side, isn't it?

A. Yes, sir.

Q. In the mountain?

A. Yes.

Q. What is the nature of the ground between that point and the point the furtherest point west of your other fence?

A. It is very rocky land. We have to dig post-holes with the crow-bar.

Q. You say you went there in '82—'81 or '2?

A. It was either one or the other, yes.

Q. '81?

A. It might have been '81 or '2—I ain't positive.

Q. Have you got with you the lease or agreement which Toponce gave you?

A. Toponce never gave me any.

Q. Which the officer gave you?

A. No, sir; he never gave me any.

Q. You are sure of that, are you?

86 A. Yes, sir. I never received any lease.

Q. How many horses did you say the company was pasturing on your land there?

A. There was about three hundred pastured there at one time.

Q. When?

A. Three or four years ago.

Q. Well, I want to know when?

A. I have not got the date with me; I can get it though.

Q. Well, what year?

A. I think somewheres along in '86.

Q. Was it in '86?

A. I am not positive.

Q. Can't you be positive—can't you state positively what year it was?

A. I could refer. I am a poor hand to remember—if I could refer to some papers I have——

Q. Refer to whatever you have to refresh your recollection—I want to know the time.

A. I could not get the time now—not the date.

Q. Have you any means of refreshing yourself in regard to the year when those horses were pastured there?

A. I think it was four years ago.

Q. I ask you whether you have any means of refreshing your recollection as to the year?

A. I might refer to some papers I have.

Q. Have you them with you on your person?

A. No, sir.

Q. Can you be any more definite in regard to it, without reference to your papers?

87 A. I could hunt up those dates.

Q. You haven't got them with you?

A. No, sir.

Q. Have you your papers in town—in Ogden?

A. There may be some with the attorney there which I could find.

Q. Will you look that up and say what year it was when those horses were pastured there?

A. I can, yes.

Q. Who, did you say, had charge of that herd of horses?

A. Mr. Carl Loveland.

Q. Who?

A. Mr. Carl Loveland levied the attachment. He was an officer of the Corinne Mill, Canal and Stock Company.

Q. Was the numbers on the attachment?

A. They were taken in the hands of an officer.

Q. Was there anybody left in charge of the herd?

A. Yes, sir.

Q. Who?

A. John Reese.

Q. Where does he live?

A. Brigham city.

Q. Still live there?

A. How?

Q. Does he still live there?

A. Yes, sir.

Q. What time of the year did he take charge of the herd of horses?

A. It was in the spring of the year—the fore part of the summer.

88 Q. How long did he remain in charge of them?

A. He boarded there at my place—a little over a year. There was different boys, it was held there for over a year.

Q. No, that is not what I ask you—I ask you how long did Reese remain in charge of them.

A. He was there several months.

Q. How many months?
A. I could not tell you.
Q. About how many?
A. I have no note of it.
Q. A month?
A. He was there several months.
Q. Is that as definite as you can be?
A. Yes, sir.
Q. As to his occupation?
A. Yes, sir.
Q. Who followed him in charge of the herd? Who took charge of the herd after he left?
A. There was a young man by the name of Caldwell.
Q. What name?
A. Caldwell.
Q. How long did he remain with them?
A. How long did he remain?
Q. Yes, sir.
A. He was there for several months.
Q. You can't tell how many months?
A. No.
Q. Who took charge of your herd after Caldwell left, if anybody?
A. A young man by the name of Payt.
89 Q. Where did Caldwell reside?
A. Brigham.
Q. Where did Payt reside?
A. He lived in Brigham City.
Q. How long did the last man—the third man, Payt—remain in charge of the animals?
A. He was there for quite awhile.
Q. How long is that?
A. I kept no note of it—I didn't take any note of it.
Q. Well, several months?
A. When one would quit, why, one would come back and relieve him. They was coming backwards and forwards, and I took no note of it.
Q. How many horses, did you say, was kept in charge?
A. The horses turned over (this varies some) covers about three hundred head.
Q. You are quite sure about the hundred head?
A. How is that?
Q. You are quite sure about the three hundred head?
A. I hav'n't took an itemized account of them, something in that neighborhood.
Q. Isn't it true, Mr. Johnson, there were sixty only?
A. Oh, no.
Q. You say that is not true?
A. It is not true that there were only sixty of them.
Q. Isn't it true that there were no more than sixty levied upon and kept by those various people?

A. They was not counted they took the entire herd. There was more than sixty.

Q. Can you tell in what month they were taken by the officer?

90 A. I am a poor hand to remember dates.

Q. Well, give us your judgment!

Mr. MALONEY: Give it as near as you can?

A. It was in the spring of the year—may have been in May—some time about May.

Mr. BENNETT:

Q. Where were they pastured, and where were they being fed at the time they were taken by the officer?

A. In the mountain country there.

Q. Any herder with them?

A. I herded them myself.

Q. Every day?

A. Oh, I looked after them; that was my business.

Q. They were pastured then in the hills?

A. Yes, sir.

Q. In the high lands?

A. Yes, sir.

Q. State whether or not they pastured in the high lands for the year following their taking by the officer, all the time.

Q. Well, the horses could ramble a good deal, I have horses go as far as Blue creek, and have some that goes up to Malad.

Q. Didn't they pasture in the bottom lands a good part of the summer?

A. There may be a stray horse wander around.

Q. No, I mean the band?

A. No, I don't think so.

Q. They did not?

91 A. No, there might be a few scattering horses get out and work around and get on the flat, but they generally are back in the hills—ranging back in the mountains.

Q. How long did you own this place before you went there in '81 or '82?

A. No, how?

Q. How long did you know of this place before you were there in '81 or '82?

A. About 18 years ago.

Q. About 18 years?

A. Yes.

Q. Have you lived in the valley that length of time?

A. I lived further north.

Q. You made no pre-emption entry up there, did you?

A. Yes.

Q. Where?

A. About 12 miles southwest.

Q. Of the place where you now live?
A. Yes.
Q. When, about when?
A. About seven years ago.
Q. About seven years ago?
A. I think so, yes.
Q. Is that a homestead filing or a pre-emption?
A. Pre-emption.

Redirect examination:

Mr. MALONEY: Mr. Johnson, do you know whether any of that land is mineral land or not?

92 A. A good many claim it to be mineral land. It is rock, broken limestone—broken rocks, limestone rocks, gravel beds and cement. It has never been decided whether it is mineral land, grazing land, or agricultural land.

E. A. STAHN, sworn for the defense and examined by Mr. MALONEY, testified as follows:

Q. Mr. Stahn, do you know of the land in controversy?
A. Sir?
Q. Do you know the land in controversy in this action?
A. Yes, I know number 5.
Q. Any of the others?
A. No, I could not say. I don't know what section they was then.
Q. Do you ever live on the land?
A. I have lived on section 5.
Q. When did you first go there?

Mr. BENNETT: I object to that, if your honor please, it is immaterial.

The COURT: I think it may be taken; he may answer it.

Exception by plaintiff.

Q. Go on—answer the question.
A. Well, I could not say for certain what it is.
Q. Well, about what?
A. It must be between sixteen and seventeen years ago.

93 Q. What improvements, if any, did you make on the land?

Mr. BENNETT: I object to that.

The COURT: What is the object?

Mr. MALONEY: This is the object. We expect to show that Johnson purchased of him—was the successor in interest of Mr. Stahn; that the land was surveyed and was to be conveyed, and by permitting him to remain there, received his application to purchase the land.

The COURT: Oh, well, for that purpose, I don't think it is of account—if it is for the purpose of offsetting——

Mr. MALONEY: That is what it is done for, for the purpose of offsetting their claims for damages; that is all it was offered for.

The COURT: Very well, you may take the testimony.

Mr. BENNETT: Exception.

Q. Well, answer the question.

A. Sir?

(The question read.)

A. I built a rock house.

Q. What else?

A. Small rock house; and beside that two wells, and fenced
94 in forty acres with two and three boards, broke up about twenty acres, corral and rock stables, set out some trees, and that is all.

Q. Can you state the value of those improvements?

A. You mean altogether?

Q. Well, you had better state them separately.

A. I don't know as I can get at it separately. The first house built, I don't think could be built under eight hundred dollars.

Mr. BENNETT: What amount did he say?

Q. Go on and state the other improvements, and give the value to the jury.

A. Well take it altogether, I think it could not be put up for less than eighteen hundred dollars—corrals, breaking land and fencing, two wells dug and stone—I had masons stone them up.

Q. When did you leave the land, Mr. Stahn?

A. I think I left nine years ago last fall. I came to Harrisville nine years ago, I think.

Q. To whom did you sell?

A. John Southwell.

Mr. BENNETT: I object to that as immaterial.

The COURT: Did you say the purchase by Mr. Johnson was from him?

Mr. MALONEY: Mr. Johnson said he purchased from Stahn.

The COURT: Very well, you can take the testimony.

95 Mr. BENNETT: Exception.

A. I sold to John Southwell.

Mr. BENNETT: I object and move to strike it out.

Mr. MALONEY:

Q. Do you know who Southwell sold to?

The COURT: It may stand on Mr. Maloney's promise to connect it with Johnson.

Q. Do you know who Southwell sold to?

A. He sold to Johnson.

Q. The defendant in this action?

A. Yes, sir.

Q. When was that?

A. That was, I think, within six months, or so; I could not say for certain; but he didn't have it a year.

Q. Within six months that you sold to Southwell, you mean?

A. Yes, sir.

Q. Do you know the land since Johnson went there?

A. Yes, sir; I have been there a number of times since.

Q. Do you know any improvements that Johnson has put on the land?

A. I believe the fence was torn down, and he rebuilt it again.

Q. Answer the question.

(Question read.)

96 A. Yes, sir. And he broke up more land.

Q. Well, go on and enumerate what he did, and state the value if there was any value on those improvements—explain them to the jury?

A. Well, the small rock house that I had built, which was covered with dirt, Johnson went and put a shingle roof on it, and raised it up higher; broke up more land, fenced all over again; the fence and bars was all broke up since I left the place.

Q. Well, if there was anything else done by Johnson, state it and state it to the jury—explain it?

A. I don't know of anything else—he built a little more barn or stable to it.

Q. Well, explain to the jury, state what he did, if anything?

A. Well, he has not put down much more after I left.

Q. How is it on the other section of land?

A. That I don't know anything about. I am not acquainted with it at all, outside of No. 5. I used to know, but I have forgotten—it is a great many years ago.

Q. Do you know whether any of that is mineral land or any part of it?

A. I could not say whether it is mineral or not, but I know it is regular big sloughs.

Q. No, I am speaking about those sections upon the mountain.

A. I could not say.

Q. You don't know about that. Did you apply to the C. P. Company to purchase any of these lands?

97 Mr. BENNETT: Wait a moment, I object.

The COURT: What is the object?

Mr. MALONEY: Under this section to show color of title.

The COURT: Mr. Maloney, does your client claim title under the Central Pacific Railroad Company?

Mr. MALONEY: Well, no, I could not say that he claimed title, but he was there rightfully and he made those improvements, and we now offer those improvements as a set off against their claim for damages.

The COURT: I think that objection should be sustained.

Mr. MALONEY: Exception.

Court adjourned until tomorrow morning.

WEDNESDAY, *February 26th*, 1890.

Jury called—all present.

N. P. ANDERSON, being recalled by the defendant, and examined by Mr. MALONEY, testified as follows:

Q. Mr. Anderson, have you any map showing whether or not all this land in controversy has been surveyed or not?

A. I have sir, but not here.

Q. Do you know what section or number of section have not been surveyed?

98 A. Well, partly.

Q. Can you tell what part have not been surveyed?

A. Well, to my best recollection section 19 has not been surveyed, and only the larger portion of 17, but not all.

Q. Any others?

A. Well, I could not say.

Q. Haven't you, since you have been in attendance on this court, seen a map what sections or part of sections have not been surveyed?

A. I don't know, perhaps that little map which I had yesterday would show it.

Q. Will this show which have not been surveyed?

A. Yes, sir.

Q. Call them out, will you?

A. Section 17 contains 120 acres of surveyed land; section 19 is unsurveyed; section 6 is unsurveyed.

Q. That is all?

A. That is that have been surveyed.

Q. Do you know whether or not the surveys have been accepted by the department?

Mr. BENNETT: I object to that, if your honor please.

The COURT: What is the object, Mr. Maloney?

Mr. MALONEY: I understand they have been rejected—all the surveys.

The COURT: What is the object?

Mr. MALONEY: They cannot get title.

99 The COURT: Well, Mr. Maloney, if it is for that purpose, I don't think it is material. The supreme court of the Territory has expressly held that these grants are grants *in presenti*. Of course, if they can't show—but the question as to whether the Government has surveyed them or not being Government survey—does not make any difference.

(Argued by counsel.)

(Question read.)

Mr. BENNETT: To that question objection was made.

The COURT: Objection sustained.

Mr. MALONEY: Exception.

Defendant rests.

PLAINTIFF'S EXHIBIT, 1 Y.

Central Pacific Railroad Company of California—Articles of Association.

1st. The name of this association shall be The Central Pacific Pacific Railroad Company of California.

2d. The number of years the same shall continue is fifty years.

100 3d. The amount of the capital stock of this company shall be eight million five hundred thousand dollars, divided into shares of one hundred dollars each.

4th. The names of nine directors to manage the concerns of the company are:

Leland Stanford	Of Sacramento.
L. A. Booth	Sacramento.
Charles Crocker	Sacramento.
C. P. Huntington	Sacramento.
James Bailey	Sacramento.
Mark Hopkins	Sacramento.
Theodore D. Judah	Sacramento.
D. W. Strong	Dutch Flat.
Charles Marsh	Nevada.

5th. The places from and to which the proposed road is to be constructed are the city of Sacramento and the eastern boundary of the State of California.

6th. The counties into and through which this road is intended to pass are Sacramento, Placer and Nevada.

7th. The length of road as near as may be is one hundred and fifteen miles.

8th. The names of the five commissioners to open books of subscription to the stock are

B. F. Moore	Of Dutch Flat.
E. G. Waite	Nevada.
Edward J. Brickett	Illinoistown.
E. McLaughlen	Grass Valley.
Samuel Cross	Sacramento.

101 9th. We, the undersigned, do hereby subscribe to the above articles of association our names, and the amounts of stock taken by us respectively in said Central Pacific Railroad Company of California:

James Bailey, Sacramento	150 shares
Mark Hopkins, Sacramento	150 "
C. P. Huntington, Sacramento	150 "
Charles Marsh, Nevada	50 "
Theo. D. Judah, Nevada	150 "
D. W. Strong, Dutch Flat	50 "

W. W. Blanchard, Dutch Flat	10	shares.
C. Cole, Sacramento	10	"
John F. Morse, Sacramento	5	"
P. H. Russell, Sacramento	5	"
N. L. Drew, Sacramento	5	"
Wm. G. English, Sacramento	10	"
Chas. G. Hooker, Sacramento	10	"
Milliken Bros., Sacramento	10	"
Lord Halbrook & Co., Sacramento	10	"
Lucius A. Booth, Sacramento	10	"
E. J. Bicknell, Illinoistown	40	"
B. Brickell, Illinoistown	20	"
B. F. Moore, Dutch Flat	10	"
H. T. Mathewson, Dutch Flat	5	"
E. L. Bradley and R. M. Trim, Dutch Flat	25	"
E. G. Waite, Nevada	10	"
John Williams, Nevada	10	"
T. Ellard Beans, Nevada	10	"
J. N. Turner, Nevada	10	"
E. McLaughlen, Grass Valley	10	"
Wm. Loutzenheiser, Grass Valley	5	"
Leland Stanford, Sacramento	150	"
C. Crocker, Sacramento	150	"
Samuel Cross, Sacramento	10	"

102 STATE OF CALIFORNIA, } ss.:
City and County of Sacramento, }

Be it remembered, that on this 27th day of June, 1861, personally appeared before the undersigned, a notary public, in and *and* for said city and county, Leland Stanford, Mark Hopkins and C. P. Huntington, three of the directors of the company named Central Pacific Railroad Company of California, and being by me duly sworn, say that the stock to the amount of at least one thousand dollars for every mile of the railroad intended to be built by said company, to wit: An amount of stock exceeding one hundred and fifteen thousand dollars has been in good faith subscribed by the members of said company, and that ten per cent. on the amount of stock subscribed, as aforesaid, has been actually in good faith paid in cash to Mark Hopkins, the treasurer appointed by the directors, named in the within articles of association, and that the subscribers to said articles of association, are all known by some one of said affiants to be the subscribers thereto and to be the persons so represented.

LELAND STANFORD.
MARK HOPKINS.
C. P. HUNTINGTON.

I hereby certify that the foregoing affidavit was duly subscribed and sworn to by said Leland Stanford, Mark Hopkins and C. P. Huntington, by and before me the day and year aforesaid.

[SEAL.] In testimony whereof I have hereunto set my hand and official seal this 27th day of June, A. D. 1861.

ELIGAH SWIFT,
Notary Public.

103 Endorsed: Filed June 28th, A. D. 1861. Fees $9.00, paid. Recorded in Book C, folio 188.

STATE OF CALIFORNIA, }
Department of State. }

I, Thos. L. Thompson, secretary of State, of the State of California, do hereby certify that I have carefully compared the annexed copy of the articles of incorporation of the "Central Pacific Railroad Company of California," with the original now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof. Also that this authentification is in due form and by the proper officer.

[SEAL.] Witness my hand and the great seal of the State, at office in Sacramento, California, the 30th day of July, A. D. 1885.

THOMAS L. THOMPSON,
Secretary of State.

STATE OF CALIFORNIA, } ss.:
County of Sacramento, }

I, W. C. Van Fleet, a judge of the superior court of the State of California, held in and for the county of Sacramento, do hereby certify that the foregoing and attached copy of the articles of association of the "Central Pacific Railroad Company of California" is duly certified by the secretary of State for the State of California, said secretary being the officer having the legal custody of the original.

104 [SEAL.] Witness my hand and the seal of said court this 1st day of August, A. D. 1885.

W. C. VAN FLEET,
Judge, Superior Court.

PLAINTIFF'S EXHIBIT 2 Y.

Amended Articles of Association of the Central Pacific Railroad Company of California.

Whereas, it has been ascertained that the capital stock of the Central Pacific Railroad Company of California is less than is necessary to complete, operate and maintain the railroad of said company, and that it will require at least twenty million dollars for that purpose; and

Whereas, the State of California, by an act entitled "An act to authorize the relocation of the route of the railroad of the Central Pacific Railroad Company of California and other matters relating thereto," approved April 17th, 1863, authorized and empowered the

said company to make and file amended articles of association in the manner therein prescribed; and

Whereas, the board of directors of the said company have deemed it necessary and proper, to amend the articles of association of the said company.

The said board of directors at their regular meeting held
105 on the third day of October, 1864, adopted the following as the amended articles of association of the Central Pacific Railroad Company of California, to wit:

Article I.

The name of the association shall be "The Central Pacific Railroad Company of California."

Article II.

The number of years that this association shall continue is fifty, commencing from the date of the original articles of association of this company, to wit: from the twenty-seventh day of June, 1861.

Article III.

The amount of the capital stock of the company is increased to and shall hereafter be twenty millions of dollars, which shall be divided into two hundred thousand shares of one hundred dollars each.

Article IV.

The number of the directors to manage the affairs of this association shall be seven.

The names of the present directors of this company are:

Leland Stanford, of Sacramento, Cal.
C. P. Huntington, of Sacramento, Cal.
Mark Hopkins, of Sacramento, Cal.
Edwin B. Crocker, of Sacramento, Cal.
106 E. H. Miller, Jr., of Sacramento, Cal.
A. P. Stanford, of San Francisco, Cal.
Charles Marsh, of Nevada, Cal.
D. W. Strong, of Dutch Flat, Cal.
Lucius A. Booth, of Virginia City, N. T.

Article V.

This association is organized for the purpose of constructing, operating and maintaining a railroad with the necessary and proper branches and extensions. The route of the railroad proposed to be constructed, operated and maintained by the company as relocated by the company, is from and to the following places, to wit: From the city of Sacramento, in Sacramento county, California, to the eastern boundary line of the State of California at or near the place, where the said line crosses the Truckee river, and running through Roseville, at the junction of said railroad with the California Central railroad, and by or near to Newcastle, Auburn, Neilsbury, Illi-

noistown, Gold Run, Dutch Flat, Bear Valley, Crystal Lake, Summit Valley and Donner Pass, together with such branches and extensions of the said railroad as the board of directors of this company may at any time deem necessary or proper to construct, operate and maintain, and which this company is or may be authorized to construct, operate and maintain by the laws of the State of California or other States or Territories or the acts of the Congress of the United States, now in force or which may hereafter be enacted.

107 Article VI.

This association is also organized for the purpose of constructing, operating and maintaining, using, selling or disposing of a telegraph line along its railroad, with the branches and extensions thereof, and such branches and extensions of said telegraph line as the board of directors of this company may deem necessary or proper, and which this company is or may be authorized to construct, operate and maintain, under and by virtue of the laws of the State of California and other States or Territories, and the acts of the Congress of the United States, now in force, or which may hereafter be enacted.

Article VII.

The counties of the State of California, into or through which the said line of railroad, from Sacramento to said place on the eastern boundary line of said State, is intended to pass, are Sacramento, Placer and Nevada.

Article VIII.

The length of the said railroad, from Sacramento to the said place on the eastern boundary line of the State of California, is, as near as may be, one hundred and fifty miles.

In witness whereof, we, constituting a majority of the board of directors of the said Central Pacific Railroad Company of California, under and by virtue of the laws of the State of California, and an order of the board of directors of said company, adopting the
108 said amended articles of association, have hereto signed our names, and caused the corporate seal of the said company, to be hereto affixed this 6th day of October, 1864.

MARK HOPKINS.
A. P. STANFORD.
E. B. CROCKER.
[SEAL.] C. P. HUNTINGTON.
LELAND STANFORD.
CHARLES MARSH.
E. H. MILLER, JR.

STATE OF CALIFORNIA, }
County of Sacramento, }

We, Leland Stanford, president, and E. H. Miller, Jr., secretary of the said Central Pacific Railroad Company of California, hereby certify that the foregoing amended articles of association, of the said

company, were duly and unanimously adopted by the board of directors of the said company, at a regular meeting thereof, held on the third day of October, 1864; and we also further certify, that the said amended articles of association were duly approved, adopted, ratified and confirmed, by the vote of the holders of a majority of the capital stock of the said company, at the annual meeting of the stockholders of the said company held on the 8th day of October, 1864.

In testimony whereof, we have hereunto set our hands and affixed the corporate seal of the said company this 8th day of October, 1864.

LELAND STANFORD,
President C. P. R. R. Co. of Cal.

[SEAL.]

E. H. MILLER, Jr.,
Sec'y C. P. R. R. Co. of Cal.

109 Endorsed: Filed in office of secretary of state, October 8th, 1864. B. B. Redding, secretary of state. Fees, $5, paid.

STATE OF CALIFORNIA, }
Department of State. }

I, Thos. L. Thompson, secretary of state of the State of California, do hereby certify that I have carefully compared the annexed copy of the amended articles of association of the "Central Pacific Railroad of California," with the original now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof. Also, that this authenication is in due form and by the proper officer.

Witness my hand and the great seal of State, at office in Sacramento, California, the 30th day of July, A. D. 1885.

[SEAL.]

THOS. C. THOMPSON,
Secretary of State.

STATE OF CALIFORNIA, } ss.
County of Sacramento, }

I, W. C. Van Fleet, a judge of the superior court of the State of California, held in and for the county of Sacramento, do hereby certify that the foregoing and attached copy of the amended articles of association of the "Central Pacific Railroad of California," is duly certified by the secretary of state for the State of California, said secretary being the officer having the legal custody of the original.

Witness my hand and the seal of said court, this first day of August, 1885.

[SEAL.]

W. C. VAN FLEET,
Judge of Superior Court.

110 PLAINTIFF'S EXHIBIT 3 Y.

Articles of association, of amalgamation and consolidation executed this twenty-second (22d) day of June, A. D. 1870, by and between "the Central Pacific Railroad Company of California," party of the first part, and "the Western Pacific Railroad Company," party of the second part, both of the said railroad companies being railroad corporations duly organized under and in pursuance of the laws of the State of California.

Whereas, "the Central Pacific Railroad Company of California," was duly organized under and in pursuance of the laws of the State of California, by filing articles of association in the office of the secretary of state of the State of California on June 28th, 1864, and amended articles of association on the 8th day of October, 1864, to construct, operate and maintain a railroad and telegraph line through the counties of Sacramento, Placer and Nevada, in the State of California, "from the city of Sacramento, in the county of Sacramento in said State, to the eastern boundary line of the State of California, at or near the place where said line crosses the Truckee river, and running through Roseville, at the junction of said railroad with the California Central railroad, and by or near to Newcastle, Auburn, Neilsbury, Illinoistown, Gold Run, Dutch Flat, Bear Valley, Crystal Lake, Summit Valley, and Donner Pass, together with such branches and extensions of the said railroad as the board of directors of said company may at any time deem necessary or proper to construct, operate and maintain, by the laws of the State
111 of California, or other States or Territories, or the acts of the Congress of the United States now in force, or which may hereafter be enacted.

And whereas, by the provisions of an act of the Congress of the United States, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1st, 1862, and the acts amendatory thereof, approved July 2d, 1864, and March 3d, 1865, the said "The Central Pacific Railroad Company of California," were authorized to locate and construct their road as aforesaid, and to locate, construct and continue the same eastward in a continuous completed line until it should meet and connect with the Union Pacific railroad, and certain rights, powers, donations, grants, rights of way privileges and franchises were given and granted to them, to aid in the construction of their said railroad.

And whereas, on the 23d July, 1868, the said "The Central Pacific Railroad Company of California," increased the capital stock of the company from twenty million dollars to one hundred million dollars, the latter amount being necessary for the constructing, completing, operating, equipping and maintaining said railroad and its extensions.

And whereas, under and in pursuance of the laws of the State of

California, "the Western Pacific Railroad Company" was duly organized on the 11th day of December, 1862 and on the 2d day of November, 1869, the "San Francisco Bay Railroad Company," another corporation organized under and in pursuance of the laws of the State of California amalgamated and consolidated its in-
112 terests, capital stock, rights, privileges and franchises with those of the said "The Western Pacific Railroad Company" and formed both of said companies into one new company and corporation to be called and known as "the Western Pacific Railroad Company," the objects and purposes of which were, to purchase, construct and own, maintain and operate certain railroad and telegraph lines, so as to form a continuous line of railway and telegraph, "commencing at a point on the Central Pacific railroad and connecting therewith at or near the city of Sacramento, and running thence by way of Stockton and the several routes mentioned in the several articles of association of the said 'The Western Pacific Railroad Company' and of the said 'San Francisco Bay Railroad Company' to a point on the San Francisco and San José railroad, and connecting therewith at or near the city of San José, and to the several other points therein mentioned, to wit: The city of San Francisco, 'Yerba Buena island,' otherwise called 'Goat island' and the point in the bay of San Francisco between 'the encinal' and the city of San Francisco; also to purchase, construct, own, maintain and operate such branch and side lines and railroads between the said 'The Western Pacific railroad' and such several points on the bay of San Francisco as the board of directors of said new and consolidated company may from time to time determine.

The length of the said railroad and telegraph line being, as near as may be, two hundred and twenty-three miles."

And whereas, by the laws of the State of California it is made lawful for any two or more railroad companies to amalgamate
113 and consolidate their capital stock, debts, property, assets, and franchises, and they are authorized and empowered so to do in such manner as may be agreed upon by the board of directors of such companies so desiring to amalgamate and consolidate their interests.

And whereas, the board of directors of the said railroad companies, parties of the first and second parts hereto, have agreed to amalgamate and consolidate the interests of said companies upon the terms, agreements, stipulations and conditions hereinafter set forth.

And whereas, more than three-fourths of the value of all the stockholders in interest of each of said companies, parties of the first and second parts hereto, give and have given their written consent to such amalgamation and consolidation upon the terms, agreements, stipulations and conditions hereinafter set forth.

The said companies, parties of the first and second parts hereto, therefore, hereby mutually covenant and agree to and with each other to the following articles, to wit:

Article I.

The said companies, parties hereto, agree to, and do by these presents amalgamate and consolidate the capital stock, debts, property, assets and franchises of each of said companies, the parties hereto of the first and second part, into one company and corporation. And all the capital stock, debts, property, assets and franchises in or to which said companies, the parties hereto or either of them, have any right, title, interest or claim, either in possession or expectancy at law or in equity or which may in any way
114 relate or pertain to the said companies, parties hereto, or either of them, are hereby amalgamated, united, merged and consolidated into one company and corporation.

Article II.

The name of the said new and consolidated company and corporation, hereby formed under these articles, shall be and is "Central Pacific Railroad Company." The said new company and corporation is to and shall continue in existence for the term and period of fifty years from the date of these articles.

Article III.

The objects and purposes of the said new and consolidated company and corporation, are, to purchase, construct, own, maintain, and operate the railroad and telegraph lines, hereinbefore described of said parties of the first and second parts hereto, so as to form a continuous line of railway and telegraph from Ogden in the Territory of Utah, to San José, in California, and to the waters of the bay of San Francisco, to wit: Commencing at or near Ogden, in Utah, at the connecting point of the Central Pacific railroad and Union Pacific railroad and running thence along the lines of the Central Pacific railroad and the Western Pacific railroad by way of Sacramento and the several routes mentioned in the several articles of association of the said "The Central Pacific Railroad of California," and of the said "The Western Pacific Railroad Company," to a point on the San Francisco and San José railroad and con-
115 necting therewith at or near the city of San José, California, and to the several other points heretofore herein mentioned, to wit:

The city of San Francisco, "Yerba Buena island," otherwise called "Goat island"—and the point in the bay of San Francisco between "The Encinal" and the city of San Francisco. Also to purchase, construct, own, maintain, and operate such branch and side lines and railroads between the said "The Western Pacific railroad" and such several points on the bay of San Francisco, and between the said "The Central Pacific railroad" and such several points on the bay of San Francisco and the navigable waters thereof, as the board of directors of said new and consolidated company may, from time to time, determine. The length of the said railroad and telegraph lines being as near as may be one thousand (1,000) miles.

Article IV.

The number of directors to manage the affairs of the said new and consolidated company and corporation shall be seven. The following-named persons shall act as such directors until others are duly elected, to wit: Leland Stanford, C. P. Huntington, Mark Hopkins, Charles Crocker, E. B. Crocker, E. H. Miller, Jr., and A. P. Stanford.

Article V.

The capital stock of the new and consolidated company and corporation is hereby fixed at one hundred million dollars, that
116 being the actual and contemplated cost of constructing the said railroad and telegraph lines thus consolidated, including the cost of the right of way, motive power, and every other appurtenance and thing for the constructing, running and operating of said railroad and telegraph lines, as nearly as can be estimated by competent engineers. The said capital stock shall consist of, and be divided into one million (1,000,000) shares of one hundred dollars each.

Article VI.

The holders and owners of the capital stock of each of the said several corporations, parties of the first and second parts hereto shall be entitled to receive and hold an equal amount and number of the shares of the capital stock of the said new and consolidated company and corporation now held by them respectively, and shall be entitled to receive from the new and consolidated company and corporation certificates therefor, upon the surrender of the certificates of stock issued by said several parties of the first and second parts, or if their right to stock is otherwise evidenced, then upon surrender of such evidence that they are entitled to certificates from either of said parties.

Article VII.

And the said several parties of the first and second parts, each for itself, hereby sells, assigns, transfers, grants, bargains, releases and conveys to the said new and consolidated company and corporation, its successors and assigns forever, all its property, real, personal and mixed, of every kind and description; all its
117 capital stock; all its interest in the shares of its capital stock, subscribed but not fully paid for; all credits, effects, judgment, decrees, contracts, agreements, claims, dues and demands of every kind and description; and all rights, privileges and franchises, corporate and otherwise, held, owned, or claimed by said parties of the first and second parts, or either of them, in possession or expectancy, either at law or in equity, subject, however, to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, claims and charges thereon, or in anywise affecting the same.

Article VIII.

The said new and consolidated company and corporation is to be liable for and shall fulfill, perform, do and pay all and each of the contracts and agreements, covenants, duties, obligations, liabilities, debts, dues and demands of the said several parties of the first and

second parts, but this amalgamation and consolidation shall not in any way relieve the said parties of the first and second parts, or the stockholders thereof, from any and all just liabilities.

In testimony whereof, the said parties of the first and second parts have severally caused these presents to be executed in duplicate, and each instrument to be signed by their respective presidents and secretaries, and the corporate seals of the said party of the first part and of the said party of the second part to be hereunto affixed, in pursuance of orders and resolutions of their several boards of directors, made the twenty-second (22nd) day of June, A. D. 1870.

THE CENTRAL PACIFIC RAILROAD CO. OF CALIFORNIA.

[SEAL.] By LELAND STANFORD, *President, and*
E. H. MILLER, JR., *Secretary.*

118 THE WESTERN PACIFIC RAILROAD CO.,

[SEAL.] By LELAND STANFORD, *President, and*
E. H. MILLER, JR., *Secretary.*

We, the undersigned, being the holders of stock to the extent of more than three-fourths of the value of all stockholders in interest of the said "The Central Pacific Railroad Company of California," party of the first part to the foregoing new articles of association, amalgamation and consolidating the said parties of the first and second parts, hereby consent to such amalgamation and consolidation and to the said new articles of association, the twenty-second day of June, A. D. 1870.

ALBERT GALLATIN.
W. R. S. FOYE.
C. H. CUMMINGS.
I. E. HOLLISTER.
JULIUS WETZLER.
J. L. FRIEND.
FRIEND & TERRY.
W. E. FERRY.
LELAND STANFORD.
CHARLES STANFORD.
By LELAND STANFORD,
His Att'y-in-fact.
MARK HOPKINS.
C. P. HUNTINGTON.
By MARK HOPKINS,
Attorney-in-fact.
C. CROCKER.
E. B. CROCKER.
By C. CROCKER, *Attorney-in-fact.*

119 E. H. MILLER, JR.
C. L. SEMDDER.
A. P. STANFORD.
By LELAND STANFORD,
Attorney-in-fact.
B. B. CROCKER.
D. O. MILLS & CO.

We, the undersigned, being the holders of stock to the extent of more than three-fourths of the value of all stockholders in interest of the said "The Western Pacific Railroad Company" party of the second part to the foregoing new articles of association, amalgamating and consolidating the said parties of the first and second parts, hereby consent to such amalgamation and consolidation and to the said new articles of association, this twenty-second day of June, A. D. 1870.

LELAND STANFORD,
C. P. HUNTINGTON,
MARK HOPKINS,
Attorney-in-fact.
MARK HOPKINS,
C. CROCKER,
E. B. CROCKER,
By C. CROCKER,
Attorney-in-fact.
E. H. MILLER, JR.
A. P. STANFORD,
By LELAND STANFORD,
Attorney-in-fact.
C. H. CUMMINGS.

Endorsed: Filed in office of the secretary of State, June 23d, 1870. H. S. Nichols, secretary of state, by Lew B. Harris, deputy.

120 STATE OF CALIFORNIA, }
Department of State. }

I, Thos. L. Thompson, secretary of state of the State of California, do hereby certify that I have carefully compared the annexed copy of the articles of consolidation of the "Central Pacific Railroad Company of California, with the Western Pacific Railroad Company" with the original now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof. Also, that this authentication is in due form and by the proper officer.

[SEAL.] Witness my hand and the great seal of State, at office in Sacramento, California, the 30th day of July, A. D. 1885.

THOS. L. THOMPSON,
Secretary of State.

STATE OF CALIFORNIA, }
County of Sacramento, } ss.

I, W. C. Van Fleet, a judge of the superior court of the State of California, held in and for the county of Sacramento, do hereby certify that the foregoing and attached copy of the articles of association of amalgamation and consolidation by and between the "Central Pacific Railroad Company of California," and the "Western Pacific Railroad Company," is duly certified by the secretary of state for the State of California, said secretary being the officer having the legal custody of the original.

Witness my hand and the seal of said court this first day of August, 1885.

[SEAL.] W. C. VAN FLEET,
Judge Superior Court.

121 PLAINTIFF'S EXHIBIT 4 Y.

Articles of association, amalgamation and consolidation, made and executed on this the 20th day of August, A. D. 1870, by and between the Central Pacific Railroad Company, of the first part, the California and Oregon Railroad Company, of the second part, the San Francisco, Oakland and Alameda Railroad Company, of the third part, and the San Joaquin Valley Railroad Company, of the fourth part, all of said parties being railroad corporations duly incorporated, organized and existing under and by virtue of the laws of the State of California, witnesseth:

That whereas, the said party of the first part was duly incorporated and organized for the purpose of constructing, owning, maintaining and operating a continuous line of railroad and telegraph from Ogden, in the Territory of Utah, to San José, in California, and to the waters of the bay of San Francisco, to wit: Commencing at or near Ogden, in Utah, at the point of junction with the Union Pacific railroad, running thence west to the eastern boundary of the State of Nevada, at the town of Toano; thence west across the State of Nevada to the eastern boundary of the State of California, at the Donner Pass, through the Sierra Nevada mountains, passing through the towns of Elko, Carlin, Argenta, Winnemucca, Wadsworth, Reno and intermediate points in the State of Nevada, to the town of Truckee, in the State of California; thence west, passing

122 the towns of Cisco, Alta, Auburn, Roseville, Sacramento, Stockton, and intermediate points, to Niles Station, in Alameda county, in the State of California; thence to a point on the San Francisco and San José railroad, and connecting therewith at or near the city of San José; also extending from said Niles Station to the city of Oakland, the city of San Francisco, Yerba Buena island, otherwise called Goat island, and the point in the bay of San Francisco, between the Encinal and the city of San Francisco. Also to purchase, construct, own, maintain and operate such branch and side lines and railroads between the said railroad and such points on the bay of San Francisco and the navigable waters thereof as the board of directors of said company may, from time to time, determine. The length of said railroad and telegraph being, as near as may be, one thousand (1,000) miles.

And whereas, the said party of the second part was duly incorporated and organized for the purpose of purchasing, constructing, owning, maintaining and operating a continuous line of railroad and telegraph commencing at Roseville, in the county of Placer, and State of California, and there connecting with the railroad of the party of the first part hereinbefore described; running thence north through the towns of Marysville and Chico, to the northern boundary of the State of California by such route and to such point

on said boundary as may be selected by its board of directors, with such extension into the State of Oregon as said board may deem proper, under and by virtue of a certain act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific railroad, in Califor-
123 nia, to Portland, in Oregon, approved July 25th, 1866," and with the power or right to change the southern terminus to some other point on said Central Pacific railroad between said town of Roseville and the bridge crossing the American river, near the city of Sacramento, whenever its board of directors may deem proper; the length of said railroad and telegraph in the State of California being, as near as may be, three hundred and thirteen miles.

And whereas, the said party of the third part, was duly incorporated and organized for the purpose of purchasing, constructing, owning, maintaining and operating a continuous line of railway from the city and county of San Francisco, through the city of Oakland, and through a point, on the easterly part thereof, in Alameda county, to a point on the line of the railroad formerly known as the San Francisco and Alameda railroad at or near Fruit Vale Station, in said county of Alameda, and also a continuous line of railroad from the extreme western point of the encinal of San Antonio, in the county of Alameda, passing through said county of Alameda, to a point on the Western Pacific railroad (now a part of the railroad of the said party of the first part), at or near Hayward, in said county of Alameda, and State of California; also for the purpose of purchasing, constructing, owning, maintaining and operating such branch and side lines and railroads between the said railroad and such several points on the bay of San Francisco as its board of directors may from time to time determine, the length of said railroad being, as near as may be, twenty-five miles.

And whereas, the said party of the fourth part was duly
124 incorporated and organized for the purpose of purchasing, constructing, owning, maintaining and operating a railroad from a point on the Western Pacific railroad (now a part of the railroad of the said party of the first part), at or near the city of Stockton, in the county of San Joaquin, in the State of California, and between said city and the crossing on the San Joaquin river to a point on Kern river, in the county of Tulare, in said State, said point to be selected by its board of directors, said road passing into or through the counties of San Joaquin, Stanislaus, Merced, Fresno and Tulare, the length being, as near as may be, three hundred miles.

And whereas, said parties believe a consolidation and amalgamation of their capital stocks, debts, properties, assets, roads, telegraphs, lands and franchises will be mutually advantageous.

And whereas, more than three-fourths in value of all the stockholders in interest of each of said parties have consented, in writing, to such amalgamation and consolidation upon the terms and conditions hereinafter set forth.

Now, therefore, under and by virtue of the statute in such case

made and provided, the said parties do hereby mutually covenant and agree, each with each and all the others, to the following articles to wit:

Article I.

Said parties do hereby amalgamate and consolidate themselves into a new corporation under the name and style of the Central Pacific Railroad Company, which new corporation shall continue in existence for the period of fifty years from the date of these
125 articles; and they do further consolidate and amalgamate their several capital stocks, debts, properties, assets, roads, telegraphs, lands, franchises, rights, titles, privileges, claims and demands of every kind whatsoever as well in possession as expectancy, at law or in equity, and do grant, convey and vest the same in said new corporation as fully as the same are now severally held and enjoyed by them or either of them, subject, however, to all conditions, obligations, stipulations, contracts, agreements, liens, mortgages, incumbrances, claims and charges thereon, or in anywise affecting the same.

Article II.

The object and purpose of said new corporation shall be to purchase, construct, own, maintain and operate all and each of the railroad and telegraph lines hereinbefore described, for the period hereinbefore stated.

Article III.

The board of directors of said new corporation shall consist of seven persons and the following-named persons shall act as such directors until their successors shall have been duly elected, pursuant to the by-laws of said new corporation hereafter to be adopted, viz: Leland Stanford, William E. Brown, Mark Hopkins, Collis P. Huntington, Chas. Crocker, Edward H. Miller, Jr., and Chas. H. Cummings.

Article IV.

The capital stock of said new corporation shall be one
126 hundred million dollars, consisting of one million shares of one hundred dollars each, that sum being the contemplated actual cost of said railroad and telegraph lines, including rolling stock, motive power, depots, etc.

Article V.

Each stockholder of each of said parties shall have the same number of shares of the capital stock of the new corporation which he now owns and holds of the capital stock of his respective company, and shall be entitled to receive from said new corporation certificates therefor, upon the surrender of the certificates now held by him, or such other evidence of his ownership as he may now have, if no certificates have been issued to him by the company of which he is now a stockholder.

Article VI.

Said new corporation shall assume and perform all the contracts, agreements, covenants, duties and obligations of what kind soever of each of the said parties, and shall pay and discharge all debts, claims and demands existing against either and all of said parties; but nothing herein contained shall release the said parties, or either of them, or their stockholders, or any of them from any of their just liabilities.

In testimony whereof, the said parties have severally caused these articles to be signed and executed by affixing thereto their respective corporate names and seals, by their respective presidents and
127 secretaries, pursuant to the orders of their respective board of directors heretofore, made on the day and year first above written.

CENTRAL PACIFIC RAILROAD COMPANY,

[C. P. R. R. Co.'s Seal.]

By LELAND STANFORD, *President*,
And by E. H. MILLER, JR., *Secretary*.

CALIFORNIA & OREGON RAILROAD COMPANY,

[C. & O. R. R. Co.'s Seal.]

By LELAND STANFORD, *President*,
And by E. H. MILLER, JR., *Secretary*.

SAN FRANCISCO, OAKLAND & ALAMEDA RAILROAD CO.,

[S. F. O. & A. R. R. Co.'s Seal. 50c. int. rev. stamp, cancelled.]

By ALFRED A. COHEN, *President*,
And by H. LACY, *Secretary*.

SAN JOAQUIN VALLEY RAILROAD COMPANY,

[S. J. V. R. R. Co.'s Seal.]

By LELAND STANFORD, *President*,
And by E. H. MILLER, JR., *Secretary*.

The undersigned, being holders of more than three-fourths in value of the capital stock of the Central Pacific Railroad Company, party of the first part, in and to the foregoing articles, do hereby consent to the terms and conditions therein contained.

Done this the 16th day of August, A. D. 1870.

LELAND STANFORD.
MARK HOPKINS.
C. P. HUNTINGTON.
By MARK HOPKINS,
Attorney-in-fact.
C. CROCKER.
E. B. CROCKER.
By C. CROCKER,
Attorney-in-fact.
W. E. BROWN.
E. H. MILLER, JR.
C. H. CUMMINGS.

128 The undersigned being holders of more than three-fourths in value of the capital stock of the California & Oregon Railroad Company, party of the second part, in and to the foregoing articles, do hereby consent to the terms and conditions therein contained.

Done this the 16th day of August, A. D. 1870.

LELAND STANFORD.
MARK HOPKINS.
C. P. HUNTINGTON,
By MARK HOPKINS,
Attorney-in-fact.
C. CROCKER.
E. B. CROCKER.
By C. CROCKER,
Attorney-in-fact.
E. H. MILLER, JR.
B. B. REDDING.

The undersigned, being holders of more than three-fourths in value of the capital stock of the San Francisco, Oakland and Alameda Railroad Company, and party of the third part, in and to the foregoing articles, do hereby consent to the terms and conditions therein contained.

Done this the 16th day of August, A. D. 1870.

ALF. A. COHEN.
D. O. MILLS.
F. D. ATHERTON.
D. P. BARSTOW.
W. C. RALSTON.

The undersigned, being holders of more than three-fourths in value of the capital stock of the San Joaquin Valley Railroad
129 Company, party of the fourth part, in and to the foregoing articles, do hereby consent to the terms and conditions therein contained.

Done this the 16th day of August, A. D. 1870.

LELAND STANFORD.
MARK HOPKINS.
C. P. HUNTINGTON,
By MARK HOPKINS,
Attorney-in-fact.
C. CROCKER.
E. B. CROCKER.
By C. CROCKER,
Attorney-in-fact.
E. H. MILLER, JR.
B. B. REDDING.
C. H. CUMMINGS.

Endorsed: Articles of consolidation by and between the Central Pacific Railroad Company, the California & Oregon Railroad

Company, the San Francisco, Oakland & Alameda Railroad Company, and the San Joaquin Valley Railroad Company. Filed in office of the secretary of state, August 22d, 1870. H. L. Nickols, secretary of state, by Lew B. Harris, deputy.

STATE OF CALIFORNIA, }
Department of State. }

I, Thomas L. Thompson, secretary of state of the State of California, do hereby certify that I have carefully compared the annexed copy of articles of consolidation, by and between the Central Pacific Railroad Company, the California & Oregon Railroad Company, the San Francisco, Oakland & Alameda Railroad Company and the San Joaquin Valley Railroad Company with
130 the original now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof. Also that this authentication is in due form and by the proper officer.

Witness my hand and the great seal of State at office
[SEAL.] in Sacramento, California, 30th day of July, 1885.

THOS. L. THOMPSON,
Secretary of State.

STATE OF CALIFORNIA, }
County of Sacramento, } *ss.*

I, W. C. Van Fleet, a judge of the superior court of the State of California, held in and for the county of Sacramento, do hereby certify that the foregoing and attached copy of the articles of association, amalgamation and consolidation between the "Central Pacific Railroad Company," "California & Oregon Railroad Company," "San Francisco, Oakland & Alameda Railroad Company," and the "San Joaquin Valley Railroad Company," is duly certified by the secretary of state for the State of California, said secretary being the officer having the legal custody of the original.

Witness my hand and the seal of said court, this 3d day of December, A. D. 1885.

[SEAL.] W. C. VAN FLEET,
Judge of the Superior Court.

131 PLAINTIFF'S EXHIBIT 5 Y.

This agreement, made and entered into on this sixth (6th) day of April, A. D. 1883, by and between the Central Pacific Railroad Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of California, and of the laws of the United States, party of the first part; and the Corinne Mill, Canal and Stock Company, a corporation organized, existing and doing business under and by virtue of the laws of the Territory of Utah, party of the second part.

Witnesseth: The party of the first part agrees to sell, and by good and sufficient deed to convey to the said party of the second part the following described parcels, tracts and lots of land, to which it has

acquired or may hereafter acquire the legal title from the United States Government; for the consideration and upon the terms and conditions to be paid and performed by the said party of the second part herein by it agreed to be paid and performed; the said parcels, tracts and lots of land herein agreed to be sold and conveyed being known, numbered, and described as follows, to wit:

Sections one (1) three (3) five (5) seven (7) nine (9) eleven (11), seventeen (17), fifteen (15), and the northwest quarter (N. W. ¼) of section thirteen (13), and lots one (1), two (2), three (3), and four (4) of section thirteen (13), and the west half (½) of section twenty-three (23), and lots one (1), two (2), three (3), and four (4) of section twenty-three (23); all of sections twenty-one (21) and nineteen (19); all in township nine (9), north of range three (3) west, Salt Lake meridian.

132 And lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8) of section one (1), the west half of southeast quarter (W. ½ of S. E. ¼) and the southwest quarter and the southwest quarter of northwest quarter (S. W. ¼ and S. W. ¼ of N. W. ¼) of section one (1) and section three (3), including lots one (1), two (2), three (3), and four (4) of section three (3), and the south half (S. ½), of section five (5), and south half of north half (S. ½ of N. ½) of section five (5), lots one (1), two (2), three (3) and four (4) of section five (5), and the east half (E. ½) of section seven (7), the east half of west half (E. ½ of W. ½) of section seven (7), and lots one (1), two (2), three (3), and four (4) of section seven (7); section nine (9), section eleven (11), section thirteen (13), fifteen (15), and seventeen (17), and east half (E. ½) of section nineteen (19), the east half of west half (E. ½ of W. ½) of section nineteen (19); lots one (1), two (2), three (3) and four (4) of section nineteen (19), section twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), and the east half (E. ½) of section thirty-one (31), and east half of west half (E. ½ of W. ½) of section thirty-one (31); and lots one (1), two (2), three (3) and four (4) of section thirty-one (31). All in township ten (10), north of range three (3) west, Salt Lake meridian.

South half (S. ½) of section one (1), south half of north half (S. ½ of N. ½), section one (1), lots one (1) two (2), three (3) and four (4), of section one (1); the south half of section three (3); the south half of north half (S. ½ of N. ½) of section three (3), lots one (1), two (2), three (3), and four (4) of section (3); the south half (S. ½) of

133 section five (5); the south half of north half (S. ½ of N. ½) of section five (5); lots one (1), two (2), three (3) and four (4), of section five (5); the east half (E. ½) of section seven (7); the east half of west half (E. ½ of W. ½) of section seven (7), lots one (1), two (2), three (3) and four (4), of section seven (7); sections nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17) and the east half (E. ½) of section nineteen (19); the east half of west half (E. ½ of W. ½) of section nineteen (19); lots one (1), two (2), three (3), four (4), of section nineteen (19); sections twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27) and twenty-nine (29) and east half (E. ½) of section thirty-one (31); the east half of west half

(E. ½ of W. ½) of section thirty-one (31); lots one (1), two (2), three (3) and four (4), of section thirty-one (31); sections thirty-three (33) and thirty-five (35). All in township eleven (11), north of range three (3), west Salt Lake meridian.

South half of section one (1), south half of north half (S. ½ of N. ½) of section one (1); lots one (1), two (2), three (3) and four (4), of section one (1); south half (S. ½) of section three (3); south half of north half (S. ½ of N. ½) of section three (3); lots one (1), two (2), three (3) and four (4) of section three (3); sections nine (9), eleven (11), thirteen (13), fifteen (15), twenty-one (21) and twenty-three (23); the north half (N. ½) of section twenty-five (25); the southwest quarter (S. W. ¼) of section twenty-five (25), the northwest quarter of southeast quarter (N. W. ¼ of S. E. ¼) of section twenty-five (25); lots one (1), two (2), three (3) of section twenty-five (25); sections twenty-seven (27), and all of section twenty-nine (29) excepting the

134 northwest quarter of the northwest quarter (N. W. ¼ of N. W. ¼); the east half (E. ½) of section thirty-one (31); the east half of west half (E. ½ of W. ½) of section thirty-one (31); lots one (1), two (2), three (3) and four (4) of section thirty-one (31); sections thirty-three (33) and thirty-five (35), and east half of the southeast quarter (E. ½ of S. E. ¼) and southeast quarter of northeast quarter (S. E. ¼ of N. E. ¼) of section seventeen (17). All in township twelve (12) north of range three (3) west, Salt Lake meridian.

The southwest quarter (S. W. ¼) of section three (3); south half of northwest quarter (S. ½ of N. W. ¼) of section three (3); lots three (3) and four (4) of section three (3); south half (S. ½) of section five (5); south half of north half (S. ½ of N. ½) of section five (5); lots one (1), two (2), three (3) and four (4) of section five (5) and the east half of the northwest quarter (E. ½ of N. W. ¼) of section seven (7); the northeast quarter (N. E. ¼) of section seven (7); east half of the southeast quarter (E. ½ of S. E. ¼) of section seven (7); northwest quarter of southeast quarter (N. W. ¼ of S. E. ¼) of section seven (7); sections nine (9), eleven (11), thirteen (13), fifteen (15), north half (N. ½) of section seventeen (17); southeast quarter (S. E. ¼) of section seventeen (17); and east half of southwest quarter (E. ½ of S. W. ¼) of section seventeen (17); northwest quarter of southwest quarter (N. W. ¼ of S. W. ¼) of section seventeen (17); sections twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), thirty-three (33), thirty-five (35). All in township thirteen (13) north of range three (3) west, Salt Lake meridian.

135 The east half of northeast quarter (E. ½ of N. E. ¼) and northwest quarter of northeast quarter (N. W. ¼ of N. E. ¼) of section thirty-one (31), and lots two (2), three (3), seven (7), eight (8), nine (9) and ten (10), of section thirty-one (31). All in township ten (10) north of range two (2) west, Salt Lake meridian.

Lots five (5) of section thirteen (13) of the southeast quarter (S. E. ¼); lots five (5) of the southeast quarter (S. E. ¼) of section twenty-three (23); the east half (E. ½) of section twenty-five (25); the north half (N. ½) of section twenty-seven (27); and the north half (N. ½) of section twenty-nine (29). All in township nine (9) north of range three (3) west, Salt Lake meridian.

All of sections thirty-three (33) and thirty-five (35) in township ten (10) north of range three (3) west, Salt Lake meridian.

All of fractional section one (1) and the fractional east half (E. $\frac{1}{2}$) of section three (3) in township thirteen (13) north of range three (3) west Salt Lake meridian. Lots one (1), four (4), five (5), and six (6), and the southeast quarter of southwest quarter (S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$) of section thirty-one (31) in township ten (10) north of range two (2) west, Salt Lake meridian, containing in the aggregate, fifty thousand and seventy-three, and twenty-three one-hundredths ($50,073\frac{23}{100}$) acres more or less.

In consideration whereof the party of the second part agrees with and binds itself to the party of the first part to pay to the said party of the first part, its successors or assigns the sum of one dollar and fifty cents $1.50 per acre in lawful money of the United States
136 at the times and in the manner following, namely: Ten per cent of the whole amount of the purchase-money at the time of and upon the execution and delivery of this contract, the balance of the whole purchase-money after deducting the said ten per cent shall be divided into fifteen equal parts, one of which parts or one-fifteenth, the said party of the second part agrees and binds itself, and hereby promises to pay to the party of the first part or to its successors or assigns annually as follows: One fifteenth of the whole on the first day of January, A. D. 1885, and one-fifteenth on the first day of January, of each and every year thereafter consecutively, for fifteen years, together with interest from and after the first day of January, 1884, in advance upon the whole amount of the purchase-money remaining unpaid at the end of the year 1884, and at the end of each year thereafter at the rate of seven (7) per cent per annum. Provided however that it is hereby agreed by the parties hereto, that the party of the second part reserve to itself and shall have the right to pay the whole or any part of the deferred payments at any time.

It is further agreed and stipulated by and between the parties hereto that any and all cases wherein third persons have before the execution of this agreement acquired an equitable right to purchase any parcel, tract or lot of the above-described lands from the said party of the first part, the party of the second part hereby agrees to settle with and satify any and all such persons either by buying out such equitable claim or right at his own expense, or by receiving from such person or persons the amount of the price at which such parcel, tract or lot of land may be now graded according to the graded price heretofore fixed thereon by W. H. Clark, field
137 agent of the party of the first part, and now on file in the land office of said first party. And thereupon releasing to said person or persons all right, title and interest acquired under this contract or conveying the title by deed if it shall then have acquired the legal title. And if the party of the second part shall fail, neglect or refuse to settle with and satisfy such person or persons then and in such cases the party of the first part shall have the right to collect and receive from such person or persons the graded price of any and all such lands, and to convey the title

thereto to such person or persons. All money received by the party of the first part in payment for lands from third persons shall be credited to the party of the second part as part payment on the balance or deferred payments owing by said second party and interest on the amount of such deferred payment so received and credited shall cease from the date of the receipt thereof by said first party.

It is further agreed and stipulated by the parties hereto, that if the party of the first part fails without any fault on its part to acquire the title from the United States to any part of the lands hereinbefore described, it shall not be required to include in its deed to the party of the second part any such lands the titles to which it fails to acquire; nor shall any cause or right of action accrue to the party of the second part or its successors or assigns, against the party of the first part, its successors or assigns by reason of or on account of such failure of title, but the party of the second part shall have the right to deduct the purchase price of one dollar and fifty cents ($1.50) per acre for each acre of land to which the party of the first part fails to acquire the title.

138 And all questions relating to failures on the part of the party of the first part to obtain title shall be left for final adjustment when the last final and full payment of the purchase-money is made.

It is further stipulated and agreed that the party of the first part reserves to itself and to its successors and assigns, and it and they shall forever have a right of way four hundred (400) feet wide for any and every railroad line now crossing over or upon any part of the lands herein described, or which it or they may hereafter desire to construct over, across or upon any part of said lands; and also a right of way of suitable width for any ditches or canals it or they have constructed or may hereafter desire to construct for irrigating or drainage purposes, and the right to use all water needed to operate and repair said railroads, and the reservation herein last mentioned shall be inserted in the deed or deeds which the party of the first part, its successors or assigns may execute to the party of the second part or to its successors or assigns.

It is further mutually agreed and understood that the party of the second part shall have immediate possession and enjoyment of the lands herein described except such parcels as may be in possession of persons who now have an equitable right to purchase from the party of the first part, and except such parcels, if any, as may be in possession of persons having title or a prior right to acquire title from the United States, and if any of said lands be in the adverse possession of third persons other than the aforesaid excepted persons, the party of the second part shall and may have the

139 right to use at its own cost and expense the name of the party of the first part to recover the same by action. And in consideration of such possession and enjoyment, the party of the second part agrees to pay and hereby promises to pay all taxes and assessments that may be at any time imposed upon said lands or any part thereof. And it is further agreed that should said party of the second part fail to pay such taxes and assessments or any part

thereof at any time when the same shall become due, the said party of the first part may pay the same and add the amount thereof to the price to be paid for said lands, and such taxes or assessments so paid with interest at the rate of seven per cent. per annum shall be paid before said party of the second part shall be entitled to a conveyance of said lands.

It is further expressly stipulated, agreed and understood by and between the parties hereto that time in the performance of the promises and undertakings therein agreed and promised to be by the party of the second part performed is of, and is hereby made the essence of this contract, and if the party of the second part, its successors or assigns shall at any time during the life of this agreement fail, neglect or refuse for thirty days after the same shall become due and payable according to the terms hereof, to pay the principal or interest or any part thereof in the sums and at the time or times as it is hereinbefore promised and agreed to pay, or shall fail, neglect or refuse to comply strictly with the stipulations of this contract, agreed by it to be performed, the said party of the second part, its successors or assigns, shall be thereby conclusively held to have forfeited all the right, title and estate legal or equitable, acquired by it or them under this contract, in or to any of the lands herein described, together with all sums of money before such forfeiture paid by it or them to the party of the first part or its successors or assigns.

And the said party of the first part its successors or assigns shall be absolutely absolved and released from any, every and all obligations on its or their part or the part of any of them to do or perform any of the acts or things herein by the party of the first part agreed by it to be done or performed. And the said first party or its successors or assigns shall have the right immediately to enter upon and take possession, in its or their own right, of said hereinbefore-described lands with all the improvements thereon.

The sum of three dollars ($3) to be paid by the purchaser hereof for the expenses of a deed when executed.

In witness whereof, the said party of the first has caused these presents to be signed in duplicate by its secretary and land agent, and the party of the second part has caused them to be signed by John W. Kerr, president, and John K. Fowler, secretary, and its corporate seal to be affixed under and pursuant to a resolution of its board of directors duly passed and adopted on the 7th day of June, 1883, thereunto duly authorizing the same.

E. H. MILLER, JR.,
Secretary Central Pacific Railroad Company.

[SEAL.]

WM. H. MILLS,
Land Agent Central Pacific Railroad Company.

JNO. W. KERR,
President Corinne Mill, Canal and Stock Company.

JOHN K. FOWLER,
Secretary Corinne Mill, Canal and Stock Company.

141 STATE OF CALIFORNIA, } ss.
City and County of San Francisco, }

On the 27th day for April, A. D. 1883, before me, Edward Chattin, a commissioner for the Territory of Utah, duly commissioned and qualified under and by virtue of the laws thereof, residing in the city and county of San Francisco and State of California, personally appeared E. H. Miller, Jr., known to me to be the secretary of the Central Pacific Railroad Company, a corporation duly organized under the laws of the State of California, whose name is subscribed to the annexed instrument, who is personally known to me to be the individual described in and who executed the annexed instrument, said Central Pacific Railroad Company being named in the said instrument, and known to me to be the corporation described therein and that executed the same as party thereto, and he, the said E. H. Miller, Jr., duly acknowledged to me that he executed the same freely and voluntarily as such secretary and as and for the act and deed of the said Central Pacific Railroad Company, and that said corporation executed the same for the uses and purposes therein mentioned, and that the seal which is thereto affixed is the corporate seal of said corporation, and was thereto affixed by authority thereof.

In witness whereof, I have hereunto set my hand and
[SEAL.] affixed my official seal at my office in the city and county of San Francisco, the day and year last above written.

EDWD CHATTIN,
Commissioner for Utah Territory in San Francisco, Cala.

142 STATE OF CALIFORNIA, } ss.
City and County of San Francisco, }

On the 27th day of April, A. D. 1883, before me, Edward Chattin, a commissioner for the Territory of Utah, duly commissioned and qualified under and by virtue of the laws thereof, residing in the city and county of San Francisco, and State of California, personally appeared Wm. H. Mills known to me to be the land agent of the Central Pacific Railroad Company, a corporation duly organized under the laws of the State of California, whose name is subscribed to the annexed instrument, who is personally known to me to be the individual described in and who executed the annexed instrument, said Central Pacific Railroad Company being named in the said instrument, and known to me to be the corporation described therein, and that executed the same as a party thereto, and he the said Wm. H. Mills duly acknowledged to me that he executed the same freely and voluntarily as such land agent, and as and for the act and deed of the said Central Pacific Railroad Company and that said corporation executed the same for the uses and purposes therein mentioned, and that the seal which is thereto affixed is the corporate seal of said corporation and was thereto affixed by authority thereof.

In witness whereof, I have hereunto set my hand and
[SEAL.] affixed my official seal at my office in the city and county of San Francisco, the day and year last above written.

EDWD CHATTIN,
Commissioner for Utah Territory in San Francisco, Cal.

143 The words "And the right to use all water needed to operate and repair said railroads" interlined before signing on page 124, lines 14, 15.

TERRITORY OF UTAH, }
County of Box Elder, } *ss:*

On this eighth day of June, 1883, personally appeared before me Henry S. Krigbaum, a notary public in and for the said county of Box Elder, Jno. W. Kerr, president, and J. K. Fowler, secretary, of the Corinne Mill, Canal and Stock Company, known to me to be the persons described in, and who executed the foregoing instrument, and who acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and
[SEAL.] affixed my official seal, the day and year in this certificate first above written.

HENRY S. KRIGBAUM,
Notary Public.

Received from the Corinne Mill, Canal and Stock Company the sum of seven thousand, five hundred and ten and $\frac{98}{100}$ dollars ($7,510.98), the same being the cash payment of ten per cent. of the whole amount of the purchase-money for fifty thousand and seventy-three and $\frac{23}{100}$ (50,073.23) acres of land, this day contracted in writing to be sold by the Central Pacific Railroad Company to the Corinne Mill, Canal and Stock Company at the price of one dollar and fifty cents per acre.

144 PLAINTIFF'S EXHIBIT 6 Y.

Award of the Right to Purchase.

As conclusive of all awards of the right to purchase lands subject of trial held by Wm. Singer, special agent of this department, on the 20th day of June, 1883, at Corinne, Utah, the following witnesseth:

That the "Corinne Mill, Canal and Stock Co." is awarded the right to purchase the following lands not including the exceptions noted below.

Sections one (1), three (3), five (5), seven (7), nine (9), eleven (11), seventeen (17), fifteen (15), and the northwest quarter (N. W. $\frac{1}{4}$) of section thirteen (13), also lots one (1), two (2), three (3), and four (4) of section thirteen (13), and the west half (W. $\frac{1}{2}$) of section twenty-three (23), also lots one (1), two (2), three (3), and four (4) of section twenty-three (23); also all of sections twenty-one (21 and nineteen

(19); all in township nine (9), north of range three (3) west, Salt Lake meridian.

Also lots one (1), two (2), three (3), four (4), five (5), six (6), seven (7), eight (8) of section one (1), the west half of southeast quarter (W. ½ of S. E. ¼). The southwest quarter (S. W. ¼) and the southwest quarter of northwest quarter (S. W. ¼ of N. W. ¼) of section one (1) and section three (3), including lots one (1), two (2), three (3), and four (4) of section three (3), and the south half (S. ½), of section five (5), and south half of north half (S. ½ of N. ½) of section five (5), lots one (1), two (2), three (3) and four (4) of section five (5), and the east half (E. ½) of section seven (7), the east half
145 of west half (E. ½ of W. ½) of section seven (7), and lots one (1), two (2), three (3), and four (4) of section seven (7); section nine (9), section eleven (11), thirteen (13), fifteen (15), and seventeen (17), and east half (E. ½) of section nineteen (19), the east half of west half (E. ½ of W. ½) of section nineteen (19); lots one (1), two (2), three (3) and four (4) of section nineteen (19), section twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27), twenty-nine (29), and the east half (E. ½) of section thirty-one (31), and east half of west half (E. ½ of W. ½) of section thirty-one (31); and lots one (1), two (2), three (3) and four (4) of section thirty-one (31). All in township ten (10), north of range three (3) west, Salt Lake meridian.

The south half (S. ½) of section one (1), the south half of north half (S. ½ of N. ½), section one (1), lots one (1), two (2), three (3) and four (4), of section one (1); the south half (S. ½) of section three (3); the south half of north half (S. ½ of N. ½) of section three (3), lots one (1), two (2), three (3) and four (4) of section three (3); the south half S. ½) of section five (5); the south half of north half (S. ½ of N. ½) of section five (5); lots one (1), two (2), three (3) and four (4), of section five (5); the east half (E. ½) of section seven (7); the east half of west half (E. ½ of west ½) of section seven (7), lots one (1), two (2), three (3) and four (4), of section seven (7); sections nine (9), eleven (11), thirteen (13), fifteen (15), seventeen (17) and the east half (E. ½) of section nineteen (19); the east half of west half (E. ½ of W. ½) of section nineteen (19); lots one (1), two (2), three (3), and four (4), of section nineteen (19); sections twenty-one (21), twenty-three (23), twenty-five (25), twenty-seven (27) twenty-
146 nine (29) the east half (E. ½) of section thirty-one (31); the east half of west half (E. ½ of W. ½) of section thirty-one (31); lots one (1), two (2), three (3) and four (4), of section thirty-one (31); sections thirty-three (33) and thirty-five (35). All in township eleven (11), north of range three (3) west, Salt Lake meridian.

South half (S. ½) of section one (1), south half of north half (S. ½ of N. ½) of section one (1); lots one (1), two (2), three (3) and four (4), of section one (1); south half (S. ½) of section three (3); south half of north half (S. ½ of N. ½) of section three (3); lots one (1), two (2), three (3) and four (4) of section three (3); sections nine (9), eleven (11), thirteen (13), fifteen (15), twenty-one (21) and twenty-three (23); the north half (N. ½) of section twenty-five (25); the southwest quarter (S. W. ¼) of section twenty-five (25), the north-

west quarter of southeast quarter (N. W. ¼ of S. E. ¼) of section twenty-five (25); lots one (1), two (2), three (3) of section twenty-five (25); sections twenty-seven (27), and all of section twenty-nine (29) excepting the northwest quarter of the northwest quarter (N. W. ¼ of N. W. ¼); the east half (E. ½) of section thirty-one (31); the east half of the west half (E. ½ of W. ½) of section thirty-one (31); lots one (1), two (2), three (3) and four (4) of section thirty-one (31); sections thirty-three (33) and thirty-five (35), and east half of the southeast quarter (E. ½ of S. E. ¼) and southeast quarter of northeast quarter (S. E. ¼ of N. E. ¼) of section seventeen (17). All in township twelve (12) north of range three (3) west, Salt Lake meridian.

147 The southwest quarter (S. W. ¼) of section three (3); south half of northwest quarter (S. ½ N. W. ¼) of section three (3); lots three (3) and four (4) of section three (3); south half (S. ½) of section five (5); south half of north half (S. ½ of N. ½) of section five (5); lots one (1), two (2), three (3) and four (4) of section five (5) and the east half of northwest quarter (E. ½ of N. W. ¼) of section seven (7); the northeast quarter (N. E. ¼) of section seven (7); east half of southeast quarter (E. ½ of S. E. ¼) of section seven (7); northwest quarter of southeast quarter (N. W. ¼ of S. E. ¼) of section seven (7); sections nine (9), eleven (11), thirteen (13), fifteen (15), north half (N. ½) of section seventeen (17); southeast quarter (S. E. ¼) of section seventeen (17); and east half of southwest quarter (E. ½ of S. W. ¼) of section seventeen (17); northwest quarter of southwest quarter (N. W. ¼ of S. W. ¼) of section seventeen (17); sections twenty-one (21), twenty-three (23), twenty-five (25) twenty-seven (27), thirty-three (33) and thirty-five (35). All in township thirteen (13) north, of range three (3) west, Salt Lake meridian.

The east half of northeast quarter (E. ½ of N. E. ¼) and northwest quarter of northeast quarter (N. W. ¼ of N. E. ¼) of section thirty-one (31), and lots two (2), three (3), seven (7), eight (8), nine (9) and ten (10), of section thirty-one (31). All in township ten (10) north, of range two (2) west, Salt Lake meridian.

Lot five (5) of section thirteen (13) of the southeast quarter (S. E. ¼); lots five (5) of the southeast quarter (S. E. ¼) of section twenty-three (23); the east half (E. ½) of section twenty-five (25); the north half (N. ½) of section twenty-seven (27); and the north half
148 (N. ½) of section twenty-nine (29). All in township nine (9) north, of range three (3) west, Salt Lake meridian.

All of sections thirty-three (33) and thirty-five (35) in township ten (10) north, of range three (3) west, Salt Lake meridian.

All of fractional section one (1) and the fractional east half (E. ½) of section three (3) in township thirteen (13) north of range three (3) west, Salt Lake meridian. Lots one (1), four (4), five (5), and six (6), and the southeast quarter of southwest quarter (S. E. ¼ of S. W. ¼) of section thirty-one (31) in township ten (10) north, of range two (2) west, Salt Lake meridian.

And in confirmation of this award contracts have been duly made and entered into on April 17th, 1883.

The exceptions alluded to in the foregoing are as follows:

HIRAM HOUSE—
E. ½ of N. E. ¼, } Sec. 31, T. 10 N., R. 2 W.
N. W. ¼ of N. E. ¼ }
120 acres at $1.50 is $180. Amount paid, $180.

H. O. HOLMGREN—
Tract N. E. ¼, sec. 3, T. 10 N., R. 3 W.
$160.05 at $6.25, $1,000.31. $256.08.

NEILS CHRISTIANSON—
N. W ¼ of N. E. ¼, sec. 13, T. 10 N., R. 3 W.
10 acres at $6.25, $250. 64.

149 CARL M. NEILSON:
S. W. ¼ of N. E. ¼, sec. 13, T. 10, N. R. 3 W.
40 acres at $6.25, $250. 64.

Dr. F. E. ROCHE:

S. ½,	sec. 19		
All	" 11		
All	" 13		
All	" 15		
N. E. ¼, N. ½ of S. E. ¼, S. E. ¼ of S. E. ¼ & N. E. ¼ N. W. ¼		T. 9, N. R. 3 W. M. or L.	
	" 21	3165.40 for $7,218.10.	$700.
All	" 23		
N. ½ of N. W. ¼	" 27		

Total sale to C. M. C. & Co.....	$75,109 84		
Paid 10 per cent.....	7,510 98		
	67,598 86		
Payments.....	2,007 70	$8,898 51	$2,007 70
Balance.....	$65,591 16		

And the award of right to purchase the foregoing-described lands is hereby made to the persons herein named and in amounts and at prices herein set forth.

WM. H. MILLS,
Land Agent, C. P. R. R.

San Francisco, Cal., December 27th, 1883.

150 PLAINTIFF'S EXHIBIT A Y.

(Title of Court and Cause.)

Writ of Possession.

The People of the Territory of Utah to the United States marshal of Utah Territory, Greeting:

Whereas on the sixth day of March, A. D. 1886, the Corinne Mill, Canal & Stock Company, plaintiff, recovered a judgment in said

district court of the first judicial district of the Territory of Utah, against William Johnson, defendant, for, among other things, the possession of certain lands and premises in said judgment and decree, and hereinafter more particularly described; and whereas the judgment-roll in the action in which said judgment was rendered is filed in the clerk's office of said court, and the said judgment was docketed in said clerk's office on the 6th day of March, A. D. 1886; now, therefore, you, the said United States marshal, are hereby commanded and required to place the said Corinne Mill, Canal & Stock Company in the quiet and peaceable possession of the lands and premises in said judgment and decree described as follows, to wit: Section five, township eleven north of range three west; sections seventeen, nineteen, twenty-one, twenty-nine, the west half of section thirty-three, and the southwest quarter of section fifteen, in township twelve, north of range three, west of the Salt Lake meridian, in Box Elder county, Utah Territory;

And you the said United States marshal, are hereby further required to make the costs accruing on this writ out of the per-
151 sonal property of said debtor, William Johnson, or if sufficient personal property cannot be found, then out of the real property in your jurisdiction belonging to him on the day whereon said judgment was docketed as aforesaid, or at any time thereafter, and make return of this writ within sixty days after your receipt thereof with what you have done endorsed hereon.

Witness the Hon. Orlando W. Powers, judge, and the seal of said district court, this 21st day of April, A. D. 1886.

T. A. PERKINS, *Clerk.*

TERRITORY OF UTAH, }
County of Webster, } ss:

I hereby certify and return that I received the within writ of possession on the 22d day of April, A. D. 1886, and that on the 23d day I served said writ, by delivering to the plaintiffs the possession of all the lands described in said writ except the last-named piece, to wit, the southwest quarter of section 15, in township 12, north range 3 west, Salt Lake meridian, United States survey, Box Elder county, Utah, and that with the consent of the plaintiffs the defendant signed a contract that he would vacate that piece of land by first receiving ten days' notice from the plaintiffs and I further state that on the 2d day of June, 1886, the court ordered that the within writ be withdrawn and that the plaintiffs pay the costs, I therefore return this writ in accordance with said order after first stating what has been done thereon.

Dated this the 11th day of June, 1886.

E. A. IRELAND,
U. S. Marshal.
By HENRY E. STEELE, *Deputy.*

152 Endorsed: Writ of possession. Filed and return, June 11th, 1886. T. A. Perkins, clerk. By I. F. Ledveredge, deputy.

EXHIBIT G.

(See pp. 56, 7 testimony.)

(Title of Court and Cause.)

The plaintiff complains and alleges:

I.

That it is now and at all dates hereinafter named it was a corporation organized, existing and doing business under and by virtue of the laws of Utah Territory.

II.

That on the 8th day of June, A. D. 1883, the plaintiff was the owner, entitled to the possession and in the possession of section 5, township 11, north of range 3 west; sections 17, 19, 21 and 29, in township 12 north of range 3 west; the west half of section 33, and the southwest quarter of section 15, township 12 north of range 3 west, Salt Lake meridian; all of said property lying, being and situate in the county of Box Elder, in the Territory of Utah.

153 III.

That afterwards on the 8th day of June, A. D. 1883, while the plaintiff was so the owner, entitled to the possession and in the possession, the defendant, without the consent and against the will and the right of plaintiff, wrongfully took possession of the demanded premises, and hence, hitherto and now unlawfully withholds the possession thereof from the plaintiff to his damage in the sum of five thousand dollars.

IV.

That the value of rents, issues and profits of the said premises from the said first day of June, A. D. 1883, and while the plaintiff has been excluded therefrom by the said defendant is one thousand dollars.

Wherefore the plaintiff prays judgment against the defendant—

1. For the recovery of the possession of the demanded premises.

2. For five thousand dollars damages.

3. For the sum of one thousand dollars, the value of the said rents, issues and profits, and costs of suit.

August 16, 1884.

EDWARD R. CHASE,
THOMAS MARSHALL,
Att'ys for Plaintiff.

154 TERRITORY OF UTAH, } ss.
County of Box Elder, }

John K. Fowler, being duly sworn, says:

1. I am an officer of The Corinne Mill, Canal and Stock Company, the plaintiff herein, to wit: the secretary thereof.

2. I have read the foregoing complaint and know the contents thereof and that the same is true to my own knowledge, except as to those matters stated on information and belief and as to those matters I believe it to be true.

J. K. FOWLER.

Subscribed and sworn to before me, this 16th day of August, A. D. 1884.

[SEAL.] H. S. KRIGBAUM,
Notary Public.

(Duly verified.)

Endorsed: Filed August 19, 1884. A. C. Emerson, clerk.

EXHIBIT H.

(Title of Court and Cause.)

Answer.

The defendant, for answer to the complaint in the above-entitled action—

Denies: That on the 8th day of June, A. D. 1883, or any
155 other time, the plaintiff was the owner or entitled to the possession or in the possession of section 5, township 11, north of range 3 west, sections 17, 19, 21, and 29, in township 12 north, of range 3 west, the west half of section 33 and the southwest quarter of section 15, township 12 north range 3 west, Salt Lake meridian; all of said property lying, being, and situated in the county of Box Elder, in the Territory of Utah.

Deny that afterwards on the said 8th day of June, A. D. 1883, or any other time, while the plaintiff was so the owner, entitled to the possession and in the possession or otherwise the defendant, without the consent and against the will and the right of the plaintiff wrongfully or otherwise or at all took possession of the described premises, or any premises of said plaintiff.

Denies that hence, hitherto, and now unlawfully or otherwise withholds the possession thereof from the plaintiff, to his damage in the sum of five thousand dollars, or any other sum whatever.

Denies that the value of the rents, issues and profits of the said premises from the said first day of June, A. D. 1883, and while the plaintiff had been excluded therefrom by the said defendant is one thousand dollars, or any other sum whatever.

Wherefore the defendant prays judgment against the plaintiff, that it take nothing by reason of said action and for costs.

GEORGE J. MARSH,
Attorney for Defendant.

156 TERRITORY OF UTAH, } ss:
County of Box Elder, }

William Johnson, being sworn in due form of law says, that he is the defendant in the above action, and he has heard read the foregoing answer and he knows the contents thereof and that the

same is true of his own knowledge, except the matters therein stated upon his information and belief, and as to those matters he believes it to be true.

WILLIAM JOHNSON.

Subscribed and sworn to before me this, the 30th day of August, A. D. 1884.

GEORGE J. MARSH,
Notary Public.

Endorsed: Filed September 5th, 1884. A. C. Emerson, clerk.

EXHIBIT P.

See page 57, testimony.

(Title of Court and Cause.)

The defendant, by leave of the court files this amended answer and alleges:

Denies that on the 8th day of June, 1883, or at any other time before the bringing of said suit, the plaintiff was the owner
157 and entitled to the possession of the northeast quarter of section five, township eleven, north of range 3 west of the Salt Lake meridian, United States survey, in Box Elder county, or that it was in the possession or entitled to the possession of said land, or that it was the owner and entitled to the possession or in the possession of sections twenty-one and twenty-nine, or the west half of section thirty-three, township twelve, north of range three west, same meridian and county aforesaid, or any or either parcel of said lands.

Denies that on that day or at any other time before the bringing of said suit whilst the plaintiff was the owner or entitled to the possession or in the possession without plaintiff's consent or against the rights of the plaintiff, wrongfully or otherwise, took possession of said lands or any of them, or that the plaintiff ever demanded of this defendant the possession of said lands or any part or parcel thereof before the bringing of said suit.

Denies that he did before the bringing of said suit in any manner unlawfully withhold possession of said lands or any portion thereof from plaintiff, or that he in any manner damages plaintiff in the sum of five thousand dollars or any other amount.

Denies that plaintiff is entitled to any rents in any sum whatever from this defendant, or that plaintiff is entitled to any rent for said land or any part thereof, or that the value of the rents of said land was one thousand dollars, or any other amount.

Denies that he was in possession or sets up any claim what-
158 ever to sections seventeen and nineteen, or the southwest quarter of section fifteen in said last-named township, and range, or the possession thereof.

Second. And for further defense this defendant alleges that under the authority and by the license and agreement of the Central Pa-

cific Railroad Company statutes and said odd sections were public and unappropriated lands of the United States previous to the construction of the Central Pacific railroad, and the said lands were claimed by the Central Pacific Railroad Company, a duly organized and incorporated railroad company, as a donation from the United States by virtue of the following statutes of the United States:

"An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean and to secure to the Government the use of the same for postal and other purposes, approved July 1st, 1862," and "An act to amend an act entitled An act to aid in the construction," reciting the above title to said act of July 1st, 1862, and which amendment was approved July 2d, 1864; see Statutes at Large of the United States, page 356.

And said railroad company having completed their line of railroad from the Pacific ocean east across the American continent to east of said lands and desiring to have their wild and uncultivated lands subjugated and made productive so as to make and increase the business of said railroad company and to furnish a carrying business for their said line of railroad then near nine hundred miles long, and the greater portion of which ran through an unsettled and barren country with but a sparse or no population, or cultivation and not intending then to put their said lands into market, but with a view of stimulating the settlement and cultivation of
159 the country and thereby increasing the value of their said lands and the business of their said line of railroad by circulars and otherwise publicly licensed and authorized any and all persons to go onto their said lands and to improve the same and that when they put their said lands on market for sale, the possessor and occupant and owner of said improvements so made on their said lands should have preference of purchasing said lands at their market value in a state of nature or without regard to the ameliorations and improvements and value thereof so put or to be put on their said donated lands.

That this general license and proposition was made so public along the line of said railroad as to be almost universally known and generally acted on, and especially in the section of country where this land in controversy is situated.

That under this general license and invitation of said railroad company, a very large portion of its lands were occupied, settled and cultivated by the pioneers and settlers of the country and among them their lands now in controversy was settled and improved by this defendant and those under whom he claims for a period of some twelve or fifteen years before the bringing this suit, and relying upon the public pledges and good faith of said railroad company those improvements became to be regarded as valuable property and had a vendible value and were sold and transferred as other lands were sold and transferred and possession was delivered to the persons.

That the lands now in controversy has been improved by this

defendant and those under whom he claims in a substantial
160 and valuable manner by permanent and lasting houses, wells for irrigation and pipes to convey the water, stables and corrals, fences, trees, clearing and cultivation of the land, all of the value of forty-four hundred dollars—a bill of particulars of said improvements is filed herewith as part hereof, marked "Exhibit A," whilst said land without said improvements and in a natural state would not be worth exceeding one thousand to one thousand five hundred dollars.

That the policy of said railroad company, as this defendant is informed and believes and charges has been that when it sold such lands as had been so improved under its license and invitation to save the rights of the possessors and holders of such improvements and to require of its vendee that he, they or it should so protect the rights of such holder and possessor of the improvements by selling to such possessor the land at its value in a natural state without the improvements.

This defendant says he has never been notified by said railroad company that it had brought into market or would sell said lands, nor has it up to the bringing said suit offered said lands to defendant at any price, nor have said plaintiffs ever offered to sell said lands to this defendant at any price.

This defendant, upon information and belief states and charges that plaintiffs made a purchase of a large quantity of lands from said railroad company, situated in Box Elder county, and among them the lands herein named on which defendant's improvements are situated and that by the terms of said purchase the plaintiffs assumed the obligations, duties and responsibilities of said railroad company and undertook to discharge the same to and with all those persons who had so settled, improved or held improvements
161 on said lands. And this defendant now claims that said plaintiffs should either sell him said lands at a fair and reasonable price or that it should pay him a fair and reasonable price for his said improvements and until it discharges its duties and obligations in some manner, it has no just and legal or equitable right to disturb his possessions.

Defendant says no notice to terminate said tenancy had ever been given him before the bringing said suit by either said railroad company or the plaintiff herein.

And he claims that he owns said improvements and betterments, notwithstanding said plaintiff, as vendee of said railroad company, may own the land in its natural and unimproved state, and that he is entitled to the possession and enjoyment of said improvements and said land until in some legal manner his rights thereto be extinguished by purchase or otherwise.

And defendant states and alleges, upon information and belief that said lands are heavily encumbered by mortgages by the railroad company and by plaintiff, but if the plaintiff can convey to him a good legal title to said land, clear of all encumbrances, he is willing, and here and now offers to purchase said lands which are so improved and possessed by him at a fair cash market price, not

considering his said improvements, or including the same in such valuation, but only the land in its natural and unimproved condition, or he will relinquish possession of said improvements and all claims thereto on being paid by plaintiff the fair cash market value of the same.

Defendant further states and alleges that his dwelling and
162 other houses and stables, barns, corrals and improvements of greatest value are on the northeast quarter of said section five, named in the complaint and that E. A. Staten, who had settled on and improved said land, did file an application to purchase said land with said railroad company on or about April 12th, 1878, and which was duly acknowledged by the answer of B. B. Redding, the then land agent of said company, and whose duty it was to acknowledge the reception of such application for and on behalf of said railroad company, and that this defendant claims to hold said possession and improvements under him through various transfers and sales.

And he further states that said railroad company did have notice of all such transfers and occupations, and that the same were open and notorious and generally known in the neighborhood of said land.

Wherefore this defendant prays that plaintiff's suit on final hearing be dismissed.

Second. That said plaintiff be enjoined from proceeding on his said suit in ejectment until the matters and things set up in defendant's cross-complaint can be heard and adjudicated.

Third. That plaintiff be compelled to either sell this defendant said land at its fair cash value when considered in its natural and uncultivated and unimproved condition, or that it do pay this defendant a fair cash value for his ameliorations and improvements made on said lands.

Fourth. That all such and further orders, judgments and de-
163 crees be made as to equity may belong and to this honorable court shall seem meet and proper and the nature of his case may require and for his costs.

GEORGE J. MARSH AND
R. K. WILLIAMS,
Attorneys for Defendant.

"EXHIBIT A."

Bill of particulars of improvement of William Johnson of lands mentioned in his cross-complaint against the Corinne Mill, Canal and Stock Company and in their complaint against him:

On northeast quarter of section five, township eleven, N. of range three west, one and one-half story dwelling-house, with four rooms, worth	$1,000 00
Rock outhouse, 15 x 20 feet, one story, worth	400 00
Log stable, 30 x 100 feet, worth	200 00
Barn, frame, worth	100 00

Two walled wells, each twenty feet deep, worth	300 00
Orchard of 50 pear and apple trees, bearing, worth	500 00
Twenty rods of iron piping laid under ground, for irrigation, with reservoir, worth	300 00
Corrals, gates and stock yards, worth	300 00
Board, pale and wire fences, worth	400 00
Sixty acres put well under cultivation, worth	300 00
164 On section thirty-three, township twelve, north range three west, forty acres put in good cultivation, worth	200 00
Fences, worth	400 00

(Duly verified.)

Endorsed: Filed November 29th, 1884. A. C. Emerson, clerk.

Exhibit X.

(See page 57, testimony.)

(Title of Court and Cause.)

The defendant, by leave of the court, files this, his second amended answer.

I.

He denies that plaintiff, on June 8th, 1883, or at any time before the bringing of the above-entitled action, was the owner or entitled to the possession of the northeast quarter of section 5, township 11, north of range 3 west, Salt Lake meridian, United States survey, or that it was in the possession thereof, or that it was the owner or in the possession or entitled to the possession of sections 21 or 29, or the west half of section 33, township 12, same range, or any or either of them.

165 II.

Denies that, on June 8th, 1883, or at any time before the bringing this suit, defendant, whilst plaintiff was in the possession or entitled to the possession or was the owner of said several tracts or parcels of land or either of them, he wrongfully or without the consent of plaintiff or its vendor took possession of said lands or any portion thereof, or that plaintiff, or its vendor, has ever demanded the possession thereof from this defendant before the bringing this suit.

III.

Denies that in any manner he did unlawfully or wrongfully withhold from plaintiff's possession said lands or any part thereof before the bringing said suit, or at any time, or that he in any manner damaged plaintiff in any sum whatsoever, or that plaintiff is entitled to recover of him any rents whatever, or that he owes plaintiff any sum whatever for rents, or that the rents of said land is worth any sum whatever.

IV.

Denies that he was in the possession of the other lands named in the complaint or set up any claim thereto, at any time, and now disavows any claim thereto, or interest therein, or possession thereof.

SECOND.

And for further cause of defense, this defendant alleges:
166 That said lands, to wit, the northeast quarter of section 5, in township 11, north of range 3 west, and sections 21, 29, and the west half of section 33, in township 12, in same range, are all situated within twenty miles of the line of the railroad of the Central Pacific Railroad Company, and in Box Elder county and Utah Territory, and was the public lands of the United States, on and previous to certain acts of Congress donating the odd sections within certain limits to the line of any railroad which should be built and that said Central Pacific Railroad Company, by virtue of the several acts of Congress and by reason of having completed a line of railroad from the Pacific ocean to the city of Ogden in said Utah Territory, claimed the ownership of said lands as being otherwise unappropriated, and having so completed said line of railroad in the year 1869, and together with the Union Pacific Railroad Company which had completed a line of railroad from the Missouri river, at Council Bluffs, in the State of Iowa, to said city of Ogden, were operating a continuous line of railroad from the Pacific ocean via Ogden, to the Missouri river at Council Bluffs, aforesaid, for the transportation of freight and passengers and which lines of railroad had been duly accepted by the United States, as completed in compliance with the said several acts of Congress and especially the following acts, to wit:

"An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July 1st, 1862; and

"An act to amend an act entitled 'An act to aid in the con-
167 struction of a railroad from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes,' approved July 1st, 1862," approved July 2nd, 1864. Sec. 13, Statutes at Large of the United States, page 356.

And said Central Pacific Railroad Company, claiming to be the owner of these and other lands from one end of its line to the other, and of all the odd sections of the public lands of the United States not otherwise appropriated within twenty miles of their line of railroad, ran for eight hundred miles through a new, and to a great extent, uncultivated and undeveloped country, and desiring not then to sell their lands at what they would command in market did not propose to sell them but for the purpose of increasing and making business for their line of railroad, the said railroad adopted a policy of inviting settlers on their lands by general and public licenses and had issued and published and scattered through the

region of their line of railroad circulars containing propositions, promises and license to all persons inclined to settle on or to cultivate their said land, by which they promised and assured such settlers that when they obtained patents and put their lands in market, that they should have preference of purchasing said lands at the graded price fixed thereon or to be fixed by said company which was and would be fixed on said lands as if in a state of nature without improvement and to secure to the occupant the value, use and title to his improvements, which improvements said company did not propose to claim to own or have title to or any benefit in, save the increase the settlement and occupancy and improvements
168 of their said land bring to its railroad in its carrying business, both as to freights and passengers.

That under these general propositions, promises, assurances and license publicly proclaimed and circulated throughout the region of its road, a very large portion of its lands were settled on and cultivated by a large number of settlers and large and valuable improvements were made and by a common consent and sustom among the occupants of said lands and owners of the improvements, said improvements were regarded as the property of the occupant of value and vendible and were sold and transferred from one to another, and this habit and custom became of general notoriety along the line of the said railroad and was known to said company and recognized by it and never forbidden nor objected to.

That under these public promises, assurance and license, by said railroad company, the lands now in controversy were settled on and large and valuable improvements have been made by this defendant and those under whom he claims, and he and those under whom he claims have occupied and improved said lands for a period of fifteen years, claiming to own and hold and possess said improvement as their own property and adverse to all the world and especially as to said railroad company.

That this defendant and his vendees have at their own expense put lasting and valuable improvements on said lands that have added greatly to their value, have erected lasting and permanent dwelling and other houses, stables, corrals, fences of various kinds, dug wells for irrigation and attached pipes for conveying the water, cleared and cultivated a large quantity of the land and fenced
169 other large quantities, planted, cultivated and raised a large orchard of fruit trees of various kinds and small fruits, garden, etc., all of the value of forty-four hundred dollars, a bill of particulars of which is filed herewith as part hereof, marked "Exhibit A."

This defendant says he has never previous to the bringing this suit been notified by said railroad company that it had rated said lands and had brought it into market and to sell it and offered him preference in the purchase thereof, nor has plaintiff ever done so.

Defendant says that since filing his amended answer and within the last twenty days he has for the first time come to the knowledge of the following facts, and that through the correspondence of one of his attorneys, R. K. Williams, with said railroad company and

his otherwise obtaining a copy of the agreement by which said railroad company sold a large quantity of land to the plaintiff by written agreement, duly signed by it and the plaintiff, bearing date April 6th, 1883, to wit:

1. That at and before the date of said agreement the said railroad company had rated the northwest forty acres of the northeast quarter of section 5, township 11, north of range 3 west, at $1.50 per acre, and the other parts of 120 acres thereof, at $5.00 per acre, and had rated sections 21 and 29, township 12, range 3 west, at $1.50 per acre, and gave to said attorney the rates of the west half of section 35, instead of the west half of section 33, in said township and range, but he says he will insert the amount when ascertained, to wit, not exceeding $4.50 per acre for any part, and $1.50 for
170 northeast quarter and $1.50 for northwest quarter of southwest quarter and $3.50 per acre for the remainder except the southeast quarter.

2. That said railroad company, by a specific agreement and covenant, part of the written articles of sale and purchase aforesaid, secured the equitable claim of this defendant and all others situated on said lands by the agreement of the plaintiff to purchase and pay for the improvements, also to sell to the occupant the said lands at its then graded price and if it failed to comply, then the said railroad company received the right to sell and convey to such settler—a copy of which agreement and covenant by and between said railroad company and said plaintiff, as part of said article of sale and purchase, dated April 6th, 1883, is herewith filed as part hereof, marked "Exhibit B." And by which the equity of this defendant and his ownership of his improvements were recognized and said plaintiff assumed the obligations of said railroad company.

Defendant says that his dwelling-house and other outhouses, stables, barns, corrals, orchard, garden, etc., and improvements of greatest value are on the said northeast quarter of section 5, township 11, north of range 3 west, as aforesaid, and that E. A. Staten originally settled on said land by the license of said railroad company and improved it by lasting and valuable improvements, under the public promises, agreements and published licenses as aforesaid of said railroad company, and filed with it an application to purchase said lands, about April 12th, 1878, and which was duly acknowledged by R. B. Redding, the then land agent for said railroad company, and that subsequently he sold his improvements
171 and equitable claim to said land and delivered possession thereof to his vendee, and that by several sales and conveyances and the delivery of possession to the several vendees the equitable claim and ownership of the land and title to the improvements came to this defendant about three and a half years since, and that he has ever since been in the peaceable and undisturbed possession of the same, claiming said improvements as his property adverse to all the world and to said railroad company and its vendee and until the bringing this suit his right and title thereto, and his equitable title to said land had not been questioned.

He says that since he became the owner and possessor of Staten's

equitable claim and title to the land and the title to the improvements on said land, he has made lasting and valuable improvements and added largely to the value of said lands, and that said transfers of the equitable claim of title to the land and improvements by said Staten and his vendees down to this defendant were open and notorious and known to said railroad company and recognized by it and never objected or complained of.

Defendant denies the right of the plaintiff in any manner to disturb his possession or in any manner to oust him from the possession of said land, or to withdraw the license of said railroad company until it either offers to sell said lands to him at the graded prices aforesaid or pays him the reasonable value of his improvements and the ameliorations of said lands by said improvements.

Wherefore, this defendant prays and demands judgment:

172 1. That plaintiff's suit be dismiss- and for his costs on final trial.

2. That said plaintiff be enjoined in proceeding on his suit in ejectment until the matters and things set up herein can be heard and adjudicated.

3. That plaintiff be compelled either to pay for said improvements or to sell this defendant the legal title to said land at the graded prices fixed thereon.

4. That all such other and further orders, judgments and decrees be made as to equity may belong and to this honorable court shall seem meet and proper.

GEORGE J. MARSH AND
R. K. WILLIAMS,
Attorneys for Defendant.

"EXHIBIT A."

Bill of particulars of improvement of William Johnson of lands mentioned in his cross-complaint against the Corinne Mill, Canal and Stock Company in their complaint against him.

On northeast ¼ of section 5, township 11, north range 3 west, one and a half story rock dwelling-house with four rooms, worth	$1,000
Rock outhouse, 15 by 20 feet, one story, worth	400
Log stable, 30 by 160 feet, worth	200
Barn house, worth	100
Two walled wells, each 20 feet deep, worth	300
Orchard, with fifty pear and apple trees, bearing, worth	500
173 Twenty rods of iron piping, laid underground for irrigation, worth, with reservoir	300
Corral, gates and stock yards	300
Board, pale and wire fence	400
Sixty acres put well under cultivation, worth	300
On section 33, T. 12, N. R. 33, forty acres put in good cultivation, worth	200
Fences, etc., worth	400

(Duly verified.)

Endorsed: Filed May 9, 1885. A. C. Emerson, clerk.

"EXHIBIT B."

It is further agreed and stipulated by and between the parties hereto that in any and all cases wherein third persons have, before the execution of this agreement, acquired an equitable right to purchase any parcel, tract or lot of the above-described lands from the party of the first part, the party of the second part hereby agrees to settle with and satisfy any and all such persons, either by buying out such equitable claims or right at its own cost and expense or be receiving from such person or persons the amount of the price at which such parcel, tract or lot of land may be now graded according to the graded price heretofore fixed thereon by W. H. Clark, field agent, of the party of the first part and now on file in the land office of said first party. And thereupon releasing to said person or persons all right, title and interest acquired under this contract or conveying the title by deed of it shall then have acquired the legal title. And if the party of the second part shall fail,
174 neglect or refuse to settle with or satisfy such person or persons then and in such cases the party of the first part shall have the right to collect and receive from such person or persons the graded price of any and all such lands and to convey the title thereto to such person or persons. All money received by the party of the first part in payment for lands from third persons shall be credited to the party of the second part as part payment on the balance of deferred payments owing by said second party, and interest on the amount of such deferred payments so received and credit shall cease from the date of the receipt thereof by the said first party.

175 (PLAINTIFF'S EX. 7 Y.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *October* 1, 1887.

I, Commissioner of the General Land Office, do hereby certify that the annexed diagram, purporting to show the limits of the grant to the Central Pacific Railroad Company from the Nevada State line to the end of the Union Pacific railroad grant in Utah, is a true and literal exemplification of that portion of a diagram prepared by, and now in the archives of this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of [SEAL.] Washington on the day and year above written.

WM. A. J. SPARKS,
Commissioner of General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 7*, 1886.

I, W. A. J. Sparks, Commissioner of the General Land Office, do hereby certify that the annexed copy of office letter, dated Oct. 16, 1873, and addressed to the register and receiver at Salt Lake City, Utah, is a true and literal exemplification of the original as shown by the records of this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of [SEAL.] Washington on the day and year above written.

WM. A. J. SPARKS,
Commissioner of General Land Office.

176 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct. 16th*, 1873.

Register and receiver, Salt Lake City, Utah.

GENTLEMEN: I transmit herewith a diagram showing the corrected limits of withdrawal upon the definitely located line of the Union and Central Pacific railroads in Utah Territory. Also the former limits of withdrawal upon a temporary line, and you are hereby directed to withdraw from sale or entry all the odd-numbered sections falling within the corrected (blue) twenty-mile limits not already withdrawn, and to restore to pre-emption and homestead entry all the odd sections heretofore withdrawn for said roads, but now falling outside of said (blue) twenty-mile limits.

The withdrawal will take effect from the date of the definite location of the road.

In order to carry the restoration into effect you will cause notice to be published in the newspaper having the largest circulation in your district, that on a day to be fixed by you, and not less than thirty days from date of notice, the lands to be restored, will again become subject to pre-emption and homestead entry.

This notice will be published and paid for in the usual manner.

You will pay no attention to the ten-mile limits laid down on the diagram as by a recent Supreme Court decision the company are now required to pay for their surveys within the entire twenty-mile limits.

Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

(Here follows diagram marked p. 177.)
(Here follows diagram marked p. 178.)

179 EXHIBIT Y.

(See page 57, testimony.)

In the District Court for the First Judicial District of Utah Territory, Weber County.

CORINNE MILL, CANAL AND STOCK COMPANY, Plaintiff, vs. WM. JOHNSON, Defendant.	On Original Complaint.
and	
WM. JOHNSON, Plaintiff, vs. CORINNE MILL, CANAL AND STOCK COMPANY and Central Pacific Railroad Company, Defendants on Cross-complaint.	On Cross-complaint.

The plaintiff, on this cross-complaint, William Johnson, who is the defendant in the original complaint, alleges and complains:

1. That the defendant herein, The Central Pacific Railroad Company, previous to and during the year 1869, had constructed and was operating a line of railroad known as the Central Pacific railroad, from the city of Ogden, in Weber county, Utah Territory, to the Pacific ocean, at San Francisco, in the State of California, and in connection with the Union Pacific Railroad Company,
180 which had constructed a railroad known and called the Union Pacific railroad from the Missouri river at Council Bluffs, in the State of Iowa, to said city of Ogden, was operating a continuous line of railroad from the Missouri river as aforesaid to the Pacific ocean as aforesaid. That both of said railroad companies had been duly incorporated and acting as corporations under the several names aforesaid, and that their respective railroads had been duly accepted by the United States, as constructed in compliance to the several acts of the Congress of the United States donating the odd sections of the public lands, not otherwise appropriated, to and for the purpose of having such railroads constructed, for a breadth of twenty miles on each side of said lines of railroad their entire length.

That the line of said road of said Central Pacific Railroad Company was constructed through a new and unsettled country, with a sparce population that afforded but a meager local business, and said company not then desiring to place on market the said lands so donated by the United States adopted a policy which it deemed wise and just, and profitable to itself, and liberal to those who should settle and improve its lands under the public invitation and license, assurances and agreement and promises which it issued and caused to be put in general circulation, and whereby the population of the country through which it passed should be increased and their barren lands made to produce and by which their passenger and freight business should be enlarged, and in pursuance of such policy it did

issue its circulars and publications, inviting all persons to settle, improve and cultivate its lands, assuring and promising all
181 such persons that when the said railroad company should put its lands in market for sale, that those having improved, settled and occupied it should have preference in the purchase of the lands so occupied and improved by them at the graded price which said company should place on the land as in its natural state and without estimating any increased price because of the improvements, as the title and ownership of the improvements were to be that of the settler and occupant.

That under this public license and agreement and assurance a large number of persons settled on and improved and cultivated numbers of tracts of its said lands.

And these improvements and the equitable right to purchase said lands as aforesaid by the common custom of those settling on and occupying said lands soon became to be recognized as property of value and vendible and sold and conveyed and the possession delivered from one to another, and which custom was known to and recognized by said railroad company and never objected to by it.

That in pursuance to such public invitation, assurance, agreement and license one E. A. Staten as early as April, 1878, settled on and substantially improved and cultivated said northeast quarter section five, township eleven north, of range three west, Salt Lake meridian, United States survey, and built thereon a substantial dwelling and other houses, and subsequently sold the same and delivered possession of said land and improvements to his vendee and by several sales and conveyances and delivery of possession, the land came to be the property of this defendant, who, and his vender, have now had peaceable, uninterrupted possession and occupancy of the same for fifteen years next before the
182 bringing of the original suit herein named, continuously, claiming said improvements as his own, adverse to all the world, to said railroad company and said plaintiff in the original suit, and that he has likewise had possession and improved sections twenty-one, and twenty-nine and the west half of section thirty-three, in township twelve, same range, and has held and possessed the improvements thereon, claiming the same as his property adverse to all the world, to said railroad company, to said plaintiff in the original suit, and which possession has been peaceable and unbroken for a period of some fourteen or fifteen years.

That said lands are all in Box Elder county and within twenty miles of the line of said Central Pacific railroad, and claimed by said railroad company as lands so donated by the United States.

That he has made lasting and valuable improvements on said lands, such as houses, stables, corrals, dug wells for irrigation purposes and affixed pipes so as to irrigate therefrom, planted and raised orchards of fruit trees of various kinds, cleared, fenced and cultivated a large portion of said lands and fenced other portions for pasturage of stock and other improvements made and owned on said lands. That his improvements so owned, occupied or made by him, are reasonably worth forty-four hundred dollars, and have

added that much to the value of said lands. That at and before April 6th, 1883, said railroad company had rated said lands, 40 acres of said N. E. ¼ of S. 5, T. 11, N. R. 3 west, at $1.50 per acre, and the remainder thereof at $5.00 per acre; and said sections 21 and 29 at $1.50 per acre; and said W. ½ of S. 33 at $1.50 for
183 N. E. ¼ per acre; $1.50 for N. W. ¼ of S. W. ¼; $4.50 for S. E. ¼ of S. W. ¼; $3.50 for the remainder of the said S. W. ¼ of section 33.

That on April 6th, 1883, said railroad company and said plaintiff in the original suit entered into a contract in writing, by which a sale and purchase of a large quantity of land was negotiated by said railroad company to said Corinne Mill, Canal and Stock Company, and as part and parcel of said written agreement, the ownership of this plaintiff to his said improvements and his equitable right to purchase said lands at said rated prices was fully recognized by both parties, and his right to have pay for his said improvements or to have said lands as aforesaid was fully recognized. That he has never before the bringing said suit of ejectment been notified of any desire on the part of said railroad company, or said plaintiff in said ejectment suit of any desire that he should purchase said land or that either of them were willing to pay him for his said improvements.

And by said agreement of April 6th, 1883, it was provided that if said Corinne Mill, Canal and Stock Company should fail or refuse to sell the lands so occupied and improved under the general solicitation and license of said railroad company to the occupant, or pay for said improvements and should fail to protect the equitable titles and equitable interest of the occupants and improvers of said lands, then the said railroad company reserved the right to sell and convey said lands at said graded prices to the occupants and holders of said improvements. A copy of that part of said written agreement is herewith filed as part hereof, marked "Exhibit I."

184 Now said plaintiff herein avers that said Corinne Mills, Canal and Stock Company, so far from complying with that part of said agreement has brought said ejectment suit in violation thereof and in violation of this plaintiff's rights.

He says that said plaintiff in said ejectment suit is fraudulently trying to get his valuable improvements without paying therefor. That it has neither offered him the said lands or any portion of it at said graded prices, nor has it offered in any manner to pay him anything for his improvements, but on the contrary claims to own said lands and the right to have immediate possession thereof without paying anything for the improvements thereon, and the said railroad company, by reason of said agreement, now has the right to sell and convey said lands to this plaintiff or to settle and adjust the matter for his improvements, and that he is willing now and hereby offers to purchase said lands at said graded prices so fixed on said lands by said railroad company, and demands that either said lands be sold and conveyed to him or that his improvements and ameliorations be paid for, and that his possession of said lands

be quieted and he left in possession of said improvements until the same be paid for.

So far as his improvements are concerned, he relies upon the lapse of time and pleads the bar by time. That the usual terms of sale of its land by said railroad company has been for a small per cent. in cash and the remainder on liberal time.

Wherefore, plaintiff herein prays to be allowed to file this cross-complaint and that proper process do issue, and on final hearing he prays and demands judgment:

185 1. That said defendants cause the legal title to said lands be made to him on the payment on usual terms of said lands.

2. That he be paid the value of his said improvements should defendants refuse to convey said lands to him.

3. That all such other and further orders, judgments and decrees be rendered as to equity may belong, and to this honorable court shall seem meet and proper.

4. That said plaintiff in the original suit be restrained and enjoined in the further prosecution of said suit until these matters can be heard in equity, and for final injunction as to said suit on final hearing hereof and for his costs.

G. J. MARSH AND
R. W. WILLIAMS,
Attorneys for Plaintiffs in Cross-complaint.

"EXHIBIT I."

It is further agreed and stipulated by and between the parties hereto that in any and all cases wherein third persons have before the execution of this agreement acquired an equitable right to purchase any parcel, tract or lot of the above described lands from the party of the first part, the party of the second part hereby agrees to settle with and satisfy any all such persons either by buying out such equitable claims or right at its own expense or by receiving from such person or persons the amount of the price at which such parcel, tract or lot of land may be now graded according to the graded price heretofore fixed thereon by H. H. Clark, field agent of the party of the first part, and now on file in the land office of said first party.

186 And thereupon releasing to said person or persons all right, title and interest acquired under this contract or conveying the title by deed of it shall then have acquired the legal title, and if the party of the second part shall fail, neglect or refuse to settle with or satisfy such person or persons, then and in such cases, the party of the first part shall have the right to collect and receive from such person or persons the graded price of any and all such lands and to convey the title thereto to such person or persons.

All money received by the party of the first part in payment for lands from third persons shall be credited to the party of the second part as part payment on the balance or deferred payment owing by said second party and interest on the amount of such deferred

payments so received, and credit shall cease from the date of the receipt thereof by the said first party.

(Duly verified.)

(Endorsed:) Filed complaint Oct. 28th, 1885. A. C. Emerson, clerk. By Isaac Goldberg, deputy clerk.

Exhibit Z.

(See p. 61, Testimony.)

(Title of Court and Cause.)

And now comes the defendant, William Johnson, and leave
187 of the court having been first had and obtained, files this, his third amended answer and cross-complaint to the said complaint filed against him in this cause on the 19th day of August, 1884, and for answer says:

He denies that on the 8th day of June, 1883, or at any other time, or at all, the said plaintiff was the owner of, or that it was entitled to the possession of the said land mentioned and described in the plaintiff's complaint, or any part or parcel of said lands.

Defendant denies that afterwards, on the 8th day of June, 1883, or at any other time, or at all, the plaintiff was the owner of said lands, or any part thereof. Denies that the said plaintiff was then, or at any other time, or at all, entitled to the possession of said lands, or any part thereof; and denies that said plaintiff was then, or at any other time, in the possession of said land, or any part thereof.

And defendant denies that heretofore or that he now, or at any other time, or at all, wrongfully took or unlawfully or otherwise withholds the said premises, or any part thereof, from the said plaintiff to its damage in the sum of five thousand dollars, or any other sum whatever, or to the said plaintiff's damage at all.

Defendant denies that the rents, issues and profits of said premises from the said 8th day of June, 1883, is one thousand dollars, or any other sum, or of any value whatever.

Defendant further answering and for defense alleges, that he and those under him he purchased and through whom he claims and their vendors, have been in the actual, peaceable, exclusive and
188 quiet possession of said lands and premises, and held the same and every part thereof with all the improvements thereon openly, notoriously and adversely to the said plaintiff, and all the world, for more than fifteen years next last past and prior to the commencement of this suit, and said cause of action is barred by the statute of limitations as provided by sections 178, 179, 180, 181, pages 184, 185, Laws of Utah, 1884, title 2, chapter 1.

And defendant here specially pleads and relies on the statute of limitations as a complete defense to this action.

And having fully answered all the allegations of said complaint, the defendant prays hence to be dismissed with costs.

Second. The plaintiff, William Johnson, who is defendant in the original complaint, now proceeds by way of cross-complaint and complains and alleges:

I.

That the Central Pacific Railroad Company, by reason of certain acts of the Congress of the United States, and by virtue of which it assumed and claimed all the odd sections of the public lands of the United States, situated on each side of its line of road within the twenty-mile limit between Ogden city, Utah, and the city of San Francisco, California, not otherwise appropriated. That the said railroad company issued public invitations, circulars, licenses, assurances and agreements and promises which it caused to be put in general circulation throughout the country inviting all persons to come and settle upon, improve and cultivate all said odd sections of land, promising and assuring all such persons that when
189 the said railroad company should put the said lands on the market for sale (in the event it became the owner thereof) that those having improved and settled on and occupied it should have preference in the purchase of the lands so occupied and improved by them at the graded price which said company should place upon the said lands in the natural state, and without estimating any increased price because of the improvements, as the title and ownership of the improvements were to be those of the settler and occupant.

That under the said public circulars, promises, license and assurances, a large number of persons settled on and improved and cultivated numbers of the said odd sections of land.

And these improvements and the equitable right to purchase said lands soon as the title thereto could be obtained from the United States, as aforesaid, by the common custom of those settling on and occupying said lands soon became to be recognized as property of value and vendible, and sold and conveyed, and the possession delivered from one to another, and which custom was knowof to and recognized by said railroad company, and never objected id by it.

That in pursuance of said public circulars, invitations, promisat, and assurances, one E. A. Stahn, as early as April, 1878, settled ag and substantially improved and cultivated said northeast quartid of section five, township eleven, north of range three (3) west, Sale Lake meridian, United States survey, and built thereon a substantiac dwelling and other houses, and subsequently sold the same and delivered possession of said lands and improvements to his vendee, and by subsequent sale and delivery of possession the same became the property of this plaintiff, who has now had quiet,
190 peaceable, uninterrupted, open, notorious, and adverse possession of the same for more than fifteen years next before the commencement of this suit, continuously claiming said improvements as his own, openly, notoriously and adversely to the

said railroad company and all the world and the said plaintiff in the original suit.

Plaintiff has also had possession of and improved sections 21 and 29, and the west half of section 33 in township 12, same range, and has held and possessed the improvements thereon, claiming the same openly and notoriously as his property, adversely to all the world, to said railroad company and to said plaintiff in the original suit, and which possession has been peaceable and unbroken for a period of fifteen years. The said lands are all in Box Elder county, Utah Territory, and within the twenty-mile limit of the said railroad and claimed by said railroad as lands contemplated in the said act of Congress. That he has made lasting and valuable improvements on said lands, such as houses, stables, corrals, dug wells for irrigation purposes and affixed pipes so as to irrigate therefrom, planted and raised orchards of fruit trees of various kinds, cleared, fenced and cultivated a large portion of said lands and fenced other portions for pasturage of stock, and other improvements made and owned on said lands; that his improvements as aforesaid are reasonably worth and have permanently enhanced the value of the said lands to the extent of $8,000.

That prior to April 6th, 1883, said railroad company had rated said lands, forty acres of said northeast quarter of section
191 five, township eleven, north of range three west at $1.50 per acre, and the remainder thereof at $5 per acre; and said sections 21 and 29 at $1.50 per acre, and the said west half of section 33 at $1.50 per acre for the northeast quarter, $1.50 for the northwest quarter of southwest quarter, $1.50 for southeast quarter of southwest quarter, $3.50 for the remainder of the said southwest quarter of section 33.

That on April 6th, 1883, said railroad company and said plaintiff in the original suit, entered into a contract in writing, by which a sale and purchase of a large quantity of land or whatever interest or claim the said railroad company had therein was attempted to be negotiated by said railroad company to said Corinne Mill, Canal and Stock Company, and as a part and parcel of said written agreement the ownership of this plaintiff to his said improvements and his equitable right to purchase said lands at said rated prices was fully recognized by both parties, and to have pay for his said improvements or to have said lands, as aforesaid, was fully recognized and acquiesced in by the said plaintiff; that he had never prior to the bringing of said suit in ejectment been notified of any desire on the part of said railroad company or said plaintiff that he should comply with the terms of the said circulars, invitations, etc., and complete his purchase of said lands; nor was this plaintiff ever notified that the said railroad company or its alleged vendee was in an attitude to make a good and valid title thereto to this plaintiff; nor did they, or either of them ever notify him that they, or either of them, would pay him for his said improvements thereon.

Plaintiff further alleges that by said agreement of April
192 6th, 1883, it was provided that if said Corinne Mill, Canal

and Stock Company should fail or refuse to sell the lands so occupied and improved under said general circulars, invitations, promises and assurances of said railroad company to the settler and occupant, and pay for said improvements, and should fail to protect the equitable titles and equitable interests of the settlers and occupants and those who had settled and improved said lands in good faith, then the said railroad company reserved the right to sell and convey the said lands at said graded prices to the occupants and holders of said improvements as soon as it should obtain titles thereto from the United States. A copy of that part of the said agreement is already of the files of record in this cause and the same is here referred to and is made a part of this cross-complaint. Plaintiff alleges that the said Corinne Mill, Canal and Stock Company has wholly failed, refused and neglected to comply with any parts of said agreement; on the contrary, it has in violation thereof brought its ejectment suit to oust plaintiff therefrom, and is now endeavoring through wrongful and fraudulent means to get possession of all of plaintiff's valuable improvements on said lands without paying him anything therefor, and in violation of his rights and equities to purchase said lands when the said railroad company shall be able to make good and valid titles thereto. Plaintiff has never offered him any portion of said lands at the graded prices, or any other price, nor to pay him anything for his improvements.

And plaintiff further alleges, that by virtue of said agreement of purchase and sale from said railroad company of said lands,
193 the plaintiff in the original suit is substituted to all the rights, duties and obligations to settlers and occupants that the said railroad company was and that on this plaintiff complying with his part of the agreement contained in said circulars and invitations and paying the first installment of the graded prices on said lands, or offering or tendering the same, a court of equity will enforce a specific performance of said agreement and compel the said plaintiff in the original suit to convey all of said lands to this plaintiff, as in equity and good conscience it should; and this plaintiff so insists and demands that it be compelled to specifically perform the same agreement that said railroad company would have had to perform had said agreement not have been made; and that as soon as the titles thereto can be obtained that it be required to convey the same to this plaintiff. Whenever the said plaintiff in the original complaint can make a good and valid title to said lands to this plaintiff, he is ready and willing to pay the first installment of the purchase-money at the said graded prices. But in the event that the said Corinne Mill, Canal and Stock Company cannot make good and sufficient titles to said lands then plaintiff insists that in equity he is entitled to a decree against said plaintiff for the full amount that his said improvements have permanently enhanced the value of the said lands and that said decree be declared to be a valid and subsisting lien on said lands, and that in the event the same be not paid within a reasonable time, that said lands be sold

or a sufficient quantity thereof to satisfy said decree, subject, however, to the paramount rights of the United States.

And plaintiff further insists that he is, by reason of the
194 various permanent improvements made on said lands as above shown, by virtue and in pursuance of said circulars, invitations, promises and assurances, a claimant for full value and that no damages would afford him an adequate compensation; and a money payment will not constitute him a sufficient redress.

While this plaintiff does not believe that at the time of the institution of the original suit, the said railroad company had any title whatever to any portion of the lands therein sued for, yet this plaintiff insists that by virtue of the congressional legislation hereinbefore referred to it had some equities therein, and will eventually obtain titles thereto and when such titles shall have been procured, then this plaintiff insists that the contract made by said railroad company, as aforesaid, with this plaintiff, to which the defendant herein is substituted, is one which a court of equity will specifically enforce. If on the final hearing of this cause it should appear that the defendant herein is not in an attitude to convey a good title to this plaintiff, then it is insisted that the final decree provide for such conveyance when the same can be made.

Wherefore, plaintiff prays to be allowed to file this his amended cross-complaint, and that proper process issue, and on final hearing he prays and demands judgment:

I.

That the said defendant, The Corinne Mill, Canal and Stock Company, be required to specifically perform the said contract as
195 made by said railroad company with this plaintiff, and to execute a good and sufficient title to all and singular of said lands to this plaintiff, as soon as said defendant obtains titles thereto on this plaintiff paying the installments as required by the said circulars, etc.

II.

That the defendant herein be required by a decree of this court to do and perform all and singular the acts and agreements that the said railroad company would have been in equity required to perform in regard to conveying the title to said lands to this plaintiff, it having taken whatever interest therein that the said railroad company had with full knowledge of this plaintiff's equities and rights for a specific performance of said railroad company's contract to convey the titles of said lands to this plaintiff as shown in its contract with said railroad company.

III.

And plaintiff further prays in the alternative, that in the event the court should be of the opinion that this plaintiff has not shown himself entitled to a decree of a court of equity for a specific performance of said contract, then he prays for a decree for the amount his said improvements have permanently enhanced the value of

said lands and that such decree be made a lien on said lands and that the same be sold in satisfaction thereof, subject, however, to the paramount lien of the United States, if it should appear that it had such lien.

196 IV.

That plaintiff have all such further and different relief as in equity and good conscience he may show himself entitled and for general relief.

V.

That said plaintiff in the original suit be inhibited and enjoined in the further prosecution of said suit until the equities of this plaintiff can be heard and determined, and for perpetual injunction as to said suit in ejectment on final hearing hereof and for costs of suit.

GEORGE J. MARSH,
THOS. MALONEY,
Att'ys for Plaintiff.

(Duly verified.)

Endorsed: Complaint. Filed March 30, 1889. H. H. Henderson, clerk, by A. H. Straka, deputy clerk.

Charge to the Jury.

The court charged the jury as follows:

GENTLEMEN OF THE JURY: This is an action brought by the plaintiff, The Corinne Mill, Canal and Stock Company
197 against William Johnson, under claim of right to recover the possession of certain lands which are described in the complaint. The complaint alleges in the first place, that it is now, speaking of the date when this complaint was made and filed, which was in '84, and at the dates hereinafter named, it was a corporation organized, existing and doing business under and by virtue of the laws of Utah Territory.

So far as that is concerned, it is not in controversy here; it is not denied by the answer, and there is no question about the incorporation of the plaintiff. It then further goes on to allege that on the 8th day of June, 1883, the plaintiff was the owner, entitled to the possession and in the possession of section 5—and then describes the land which has been given heretofore in your hearing; and further, that afterwards, on the 8th day of June, 1883, while the plaintiff was so the owner, entitled to the possession, and in the possession, the defendant without the consent and against the right of the plaintiff took possession of the demanded premises, and hence, hitherto, and now, unlawfully withholds the possession thereof from the plaintiff, to his damage in the sum of five thousand dollars.

Now, you will see by that, gentlemen, that the plaintiff in this case alleges that he was the owner of a certain piece of land; that

he was entitled to the possession and in the possession of it at a certain time, and that the defendant intruded himself thereon and unlawfully took possession thereof, and this suit is brought under claim of right to recover that possession.

The defendant has denied by his answer, which is on file
198 here, and that is the issue you are to try, denies the fact in the first place, that the plaintiff owned this land, or had any right to the possession of it at all, and claims that if it did own the land, that he has been in possession of it so long, adversely to the plaintiff, that he is actually entitled to it; and those are two questions for you to determine. This is a suit in ejectment. It alleges the right to the possession always of the land, that is in dispute. Of course, the right of possession always follows title to real estate. The party that has title, or possession, of the ground is constructively in its possession, unless somebody else is actually in the possession. If it is vacant and unoccupied land, and a person owns it, he is presumptively supposed to be in possession of it, because possession follows ownership. In this case the plaintiff undertakes to show his right of possession by showing ownership of the land; so it comes to the question of title, as to whether the plaintiff has the title of right to occupy it in the place of the proprietor of the land. It is claimed in the first place that the Central Pacific Railroad Company owned the land and that it had a contract with the company which gives it the right to take possession of that land, and exercise the right of ownership over it, the same as the Central Pacific Railroad Company could do.

And the plaintiff has put in evidence here the contract between it and the Central Pacific Railroad Company, and I charge you that, as a matter of law, if the Central Pacific Railroad Company owned these lands at the time this contract was made, then the plaintiff here would have the right to take the possession of the land. It would have the right to the possession under that contract, because that contract gives to the plaintiff here the right to take pos-
199 session of this and many other lands and to operate them and use them and pasture them, and gives it the right to purchase them in the end. So that comes to be a question you will see as to the title, and as to whether the Central Pacific Railroad Company owned those lands. That is the whole question in this case, as to whether the Central Pacific Railroad Company owned these lands and were entitled to the possession. Now, the plaintiff, on its part, has undertaken to show that it derived that title from the Government. You can presume that the title started in the Government at some time, as, whoever derains title, or shows the chain of title from the Government, is presumptively the owner of the land. Now, acting upon this principle, the plaintiff has undertaken to show here, that it has derived title from the Government to the land, but, as matter of law, gentlemen, I charge you that the plaintiff has failed in that; the proof which he has submitted here of the ownership of these lands on the part of the Central Pacific Railroad Company by grants of Congress is defective, so defective that it does not show title whatever. The acts of Congress that have been put

in here were taken from the consideration of the jury, it being my opinion that certain requisites have not been shown—certain things have not been shown as complying with that statute in order to perfect the title under the grants made by Congress; what they are it is unnecessary for me to state here. Now, that being the situation, the plaintiff itself seeks to recover by showing that the Central Pacific Railroad Company was the owner of these lands, by showing that the defendant had acknowledged that fact, that he had
200 acknowledged that the Central Pacific Railroad Company was the owner of those lands, and that is the question for you to determine, as to whether the defendant has made such an admission of such fact, as to establish it as a matter of fact. I do not submit it to you as a question of estoppel, but the defendant, even though he has admitted that the Central Pacific Railroad Company owned these lands is not estopped from denying that fact. It is not shown that the plaintiff has acted upon that admission or anything of the kind. It is simply introduced here as an admission by the defendant of this fact, and that plaintiff says this is so strong an admission as a matter of fact, that it shows the fact that the Central Pacific Railroad Company did own those lands. And so, gentlemen, it becomes to be a question of construction by you and a consideration as to what this admission is. It *it* contended in the instruments which are put in evidence here before you—being the original cross-complaint in this action; but the cross-complaints have been dismissed, and they are no evidence, and you are to take those and consider in the first place what the language is; whether the defendant in these instruments has acknowledge that the Central Pacific Railroad Company was the owner of those lands.

You are to consider what the language of these instruments are—taking them altogether. You are to take them just as you would a conversation exactly, just what was said—take and consider it altogether and decide whether it amounts to an admission that is so clear that it establishes in your mind that the Central Pacific Company owned these lands in the first place, and whether the defendant himself knew whether they owned the lands or not. And
201 in the first place as to whether he has stated and decided what the meaning of those papers are, whether it — his own or somebody else's, and all these things are to be considered and if it is of sufficient strength, so that you are satisfied, so that he knew the fact at that time as to whether the Central Pacific Railroad Company was the real legal owner of these lands or not, and knowing that fact he has deliberately stated that that was the fact, knowing what was the situation—understanding it perfectly—understand all the meaning of the language that he has used and that the language is clear and definite, and that he intended to make that admission, and that it is so clear to establish in your mind the facts that the Central Pacific Railroad Company did own the lands, then you may find that it was the owner of those lands from that admission.

Now, you are to remember in determining that question that the burden of showing that these lands belong to the Central Pacific

railroad is in the plaintiff. The plaintiff must show it. It alleges the fact here that it was the owner of these lands, that the Central Pacific company was the owner and it must prove that fact by a preponderance of evidence, and the burden is at all time upon plaintiff to show it—that it makes no difference what the claim or position of the defendant may be, or whether the defendant establishes any title at all, or whether he has made any claim to any title—for it is at all times upon the plaintiff to show that it owned those lands—in other words, the plaintiff may rely upon the strength of his own title, and not on the weakness of his adversaries' title.

If it is not shown that it is entitled to these lands, then it is
202 no matter who does own them, or on whose lands Johnson was living, so that it would be a defense in a case like this where the title is put in question, if the defendant could show that some other person than himself was really the owner of those lands in question and under the plaintiff.

Now, you are to determine the question as to whether the ownership of these lands was in the Central Pacific Railroad Company or not. If you should find that it was not, or fail to find that it was in other words—then you may stop all further consideration of this question and return a verdict in favor of the defendant and you won't be troubled with that any further; but, if you should find by preponderance of evidence that the lands did belong to the Central Pacific Company at the time this contract was made with the Corinne Mill, Canal and Stock Company, then you are to consider the question as to whether the defendant, the persons under whom he claims as his grantors, or his predecessors in interest, have been in the possession of the lands seven years before the commencement of this suit, claiming adversely to the plaintiff or the Central Pacific Railroad Company.

It is not sufficient to show that the party has been in possession of the land for seven years, for ten years, or for twenty years even, but it must be further shown that they were in possession, claiming title adversely to the plaintiff in that connection, and when that is shown that they had been in possession peaceably and quietly for seven years, claiming the land belonged to them, claiming them adversely to the plaintiff, and they claimed they belonged to them,

under color of title, why that would be adverse to all the
203 world—then of course, the statute of limitations may be applied, and the plaintiff could not recover, even though he held the lands. You are to consider the testimony in regard to all these questions.

This case was commenced in August, '84, it would be seven years before that there must be a claim of title in the defendant adverse to the plaintiff.

Mr. BENNETT: I desire to interpose an objection to this part of the charge, as there is no testimony at all to base the charge upon, as I claim.

The COURT: I don't know, Mr. Bennett, as there is. I hav'n't in mind very definitely the testimony as to the time when those lands were taken possession of.

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Now, you are to determine the question as to whether the ownership of these lands was in the Central Pacific Railroad Company or not. If you should find that it was not, or fail to find that it was in other words—then you may stop all further consideration of this question and return a verdict in favor of the defendant and you won't be troubled with that any further; but, if you should find by preponderance of evidence that the lands did belong to the Central Pacific Company at the time this contract was made with the Corinne Mill, Canal and Stock Company, then you are to consider the question as to whether the defendant, the persons under whom he claims as his grantors, or his predecessors in interest, have been in the possession of the lands seven years before the commencement of this suit, claiming adversely to the plaintiff or the Central Pacific Railroad Company.

It is not sufficient to show that the party has been in possession of the land for seven years, for ten years, or for twenty years even, but it must be further shown that they were in possession, claiming title adversely to the plaintiff in that connection, and when that is shown that they had been in possession peaceably and quietly for seven years, claiming the land belonged to them, claiming them adversely to the plaintiff, and they claimed they belonged to them, under color of title, why that would be adverse to all the
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This case was commenced in August, '84, it would be seven years before that there must be a claim of title in the defendant adverse to the plaintiff.

Mr. BENNETT: I desire to interpose an objection to this part of the charge, as there is no testimony at all to base the charge upon, as I claim.

The COURT: I don't know, Mr. Bennett, as there is. I hav'n't in mind very definitely the testimony as to the time when those lands were taken possession of.

Mr. MALONEY: I want to call your honor's attention to the answers and cross-complaints which Judge Bennett has put in evidence.

The COURT: Well, gentlemen, the claim may be in these cross-complaints of the time or the length of time, that this land *have* been occupied as no evidence whatever of the time. The plaintiff cannot establish his case upon proof of that kind in an action of this kind, by simply showing that in these pleadings he has alleged it.

It must be evidence outside of that—outside of the pleadings in this case. As to whether there is any evidence upon that subject, I do not definitely myself recollect, but that is a question for you to determine.

204 Now, if you should pass by that question, and come to the allegation that the plaintiff is entitled to recover, then you will come to the consideration of still another question. And that is, the amount that the plaintiff is entitled to recover from the defendant for the use of this land from the time the defendant has had it in his possession, and in estimating that you will first determine how much the plaintiff has been deprived of by the defendant occupying this land whether from him, and what the lands were worth for the use—such as they could have been—consider the character of the land and the country they are in, and the situation generally, and against that you can offset it by any permanent improvements that you find the defendant in this case has made upon these lands, and when you have struck the balance the balance will be the damages or mesne profits that the plaintiff would be entitled to recover from the defendant for withholding these premises from him.

Now, gentlemen, this is the question you are to determine, as to whether the Central Pacific Company was the owner of these lands, and that is to be determined purely upon the evidence that is given here. You are to determine whether the Central Pacific Company owned these lands by a preponderance of the evidence, and if they did,

Second. As to whether the defendant, or persons who succeeded him in interest, have been in the peaceable and uninterrupted possession in the premises, claiming adversely to all the world, that is, for seven years before the commencement of this action.

And if you find both these questions in favor of the plaintiff, then proceed to the damages.

205 You are the sole judges of all the facts in the case, the credibility of witnesses, and what the testimony in the case establishes.

Mr. BENNETT: It is agreed between counsel that such exceptions to the charge of the court may be made hereafter as counsel desires.

The foregoing were all the instructions given to the jury.

The plaintiff excepted and excepts to the charge as a whole and to each and every part and portion of the charge separately.

The jury retired and, on February 26, 1890, returned into court a verdict in favor of defendant and against plaintiff, "no cause for action," and on that day judgment was entered, on said verdict, in

favor of defendant and against plaintiff, that plaintiff recover nothing and that defendant recover of plaintiff his costs herein. A motion to retax the costs is now pending, undisposed of. On March 7th, 1890, plaintiff filed and served on defendant notice of intention to move for a new trial of the action, of which the following is a copy, to wit:

(Title of Court and Cause.)

To the defendant and Marsh & Maloney, his attorneys:

Take notice that the plaintiff intends to and will move the court to vacate and set aside the verdict and judgment herein rendered in favor of defendant and against plaintiff, on February 26, 1890, and to grant a new trial of the action, on the following grounds:

206 1. Insufficiency of the evidence to justify or support the verdict and judgment.

2. That the verdict and the judgment are each against the law.

3. Errors in law occurring at the trial and excepted to by the plaintiff.

The motion will be made on the records and files herein, and on a statement of the case to be hereafter prepared and served on you.

Dated March 7, 1890.

BENNETT & BRADLEY,
Attorneys for Plaintiff.

The plaintiff specifies the following errors and particulars wherein the evidence is insufficient to support the verdict and *and* judgment, viz:

The court erred in overruling plaintiff's objections to the admission of testimony, and in admitting testimony over plaintiff's objections, and in overruling plaintiff's motions to strike out testimony, and in striking out testimony against plaintiff's objections, to all of which exceptions were entered and are noted, and all of which specifically appears in the foregoing statement. The court erred in each and every part and portion of its charge to the jury. The verdict and the judgment are not, nor is either, supported by but contrary to the evidence, the facts in the case, and the law, and the verdict is contrary to the express instructions given to the jury. The evidence shows that, on June 8th, 1883, and ever since then and now, the plaintiff was, has been and is the owner and entitled to the possession of the lands and

207 premises described in the complaint, and that the defendant wrongfully and without the consent of plaintiff entered into possession of said lands and unlawfully withheld and continuously since entry, has so withheld and does now so withhold possession thereof from plaintiff to the plaintiff's damage in the sum of $2,000, and that the value of the rents, issues and profits of the land so withheld, while withheld, was and is $1,000, the amount demanded, and over. The evidence shows that said lands were granted by the United States to the Central Pacific Railway Company, or to its pre-

decessors in interest and afterward acquired by it, and that they were owned by said company and by said company sold to the plaintiff, and the right to occupy and possess them was granted by said company to, and was held by, the plaintiff, on the date alleged in the complaint and during the time since then. The evidence shows that defendant has frequently admitted plaintiff's right of possession and title to the lands. The evidence also shows that the land was all agricultural and grazing land; that none of it was mineral in character, that no pre-emption, homestead or other lawful claim had attached to the land and that there were no persons living on it as homesteaders or pre-emptors or settlers, at or prior to the time when the line of the railroad was definitely fixed.

The evidence does not show title by adverse possession in the defendant. The evidence shows that the land was not fenced, occupied, used, cultivated or improved in the manner or to the extent required by law as the foundation for such a claim, and that the far larger part of said lands were not fenced, occupied, used, cul-
208 tivated or improved at all, and that defendant had within the seven years next preceding the commencement of this action, and afterwards by lease, by agreement, by his verified pleadings herein and otherwise, admitted that he did not own or lawfully possess the lands, and that plaintiff and its predecessor in interest did own them and was entitled to their possession, and the evidence fails to show that defendant claimed right or title to them adverse to the world or as against all other right, but shows quite to the contrary, and does not show that the defendant paid the taxes or any taxes or assessments on or against the lands or improvements thereon, or on his alleged possessory rights thereto, during any year or period.

The court erred in not ordering the return of a verdict for plaintiff, and in rendering judgment against, and not in favor of, plaintiff.

The time within which this statement might be served, has been extended to and including April 15th, 1890.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Plaintiff.

We admit due service on us of the foregoing statement on April 11th, 1890.

MARSH & MALONEY,
Attorneys for Defendant.

The foregoing statement is settled, and I certify the same is allowed.

H. P. HENDERSON, *Judge.*

April 17th, 1890.

209 (Title of Court and Cause.)

Notice of Intention to Move for New Trial.

To the defendant and Marshall & Maloney, his attorneys:

Take notice, that the plaintiff intends to and will move the court to vacate and set aside the verdict and judgment herein rendered in favor of the defendant and against plaintiff on February 22d, 1890, and to grant a new trial of the action, on the following grounds:

1. Insufficiency of the evidence to justify or support the verdict and judgment.

2. That the verdict and the judgment are each against law.

3. Errors in law occurring at the trial and excepted to by the plaintiff.

The motion will be made on the records and filed herein, and on a statement of the case to be hereafter prepared and served on you.

BENNETT & BRADLEY,
Attorneys for Plaintiff.

Dated March 7, 1890.

Endorsed: Title. Notice of intention to move for new trial. Service admitted and filed March 7, 1890. H. H. Henderson, clerk.

210 *Order Overruling Motion for New Trial.*

(Title.)

The motion for a new trial in this cause having been submitted by counsel without argument, now comes the court, being fully advised in the premises, — orders that said motion be and the same is hereby denied.

Done in open court, April 23, 1890.

H. P. HENDERSON, *Judge.*

(Title.)

Notice of Appeal.

To the defendant and to Messrs. Marsh & Maloney, his attorneys:

You are notified that the plaintiff company appeals to the supreme court of Utah Territory from the whole and every part of the judgment herein rendered in favor of the defendant and against the plaintiff on February 26, 1890, and from the whole and every part of the order herein made on April 23d, 1890, overruling plaintiff's motion for a new trial of the action.

BENNETT, MARSHALL & BRADLEY,
Plaintiff's Attorneys.

Dated April 28, 1890.

Endorsed: Title. Notice of appeal. Served and filed April 28, 1890. H. H. Henderson, clerk, by L. B. Best, deputy clerk.

211 *Clerk's Certificate.*

TERRITORY OF UTAH, }
County of Weber, } ss.:

I, H. H. Henderson, clerk of the district court, first judicial district, Utah Territory, Weber county, do certify that except for the omission of titles in full, the foregoing are full, true and correct copies of the complaint, third amended answer and cross-complaint, verdict, judgment on verdict, order extending time to serve statement on motion for new trial and for appeal, notice of intention to move for a new trial, statement on motion for new trial and for appeal, order overruling motion for new trial, and notice of appeal in the case of Corinne Mill, Canal and Stock Company, plaintiff and appellant, *versus* William Johnson, defendant and respondent, the originals of which are of file and of record in my office; and I further certify that an undertaking on appeal of said case, in due form, was on May 12, 1890, properly filed and is of file in my office.

Witness my hand and the seal of my court at Ogden, in Weber county, Utah, this 28th day of July, 1890.

[SEAL.]

H. H. HENDERSON,
Clerk First Jud'l Dist. Court.
Per —— ——, *Deputy Clerk.*

212 In the Supreme Court of Utah Territory, January Term, 1891.

WEDNESDAY, *January 14th.*

THE CORINNE MILL, CANAL AND STOCK COMPANY, Appellant,
vs.
WILLIAM JOHNSON, Respondent. } Appeal from 1st District.

This cause coming on regularly for hearing was argued by John A. Marshall, Esq., for appellant, and by Thomas Maloney, Esq., for respondent, was submitted and taken under advisement.

June Term, 1891.

FRIDAY, *June 5th.*

THE CORINNE MILL, CANAL AND STOCK COMPANY, Appellant,
vs.
WILLIAM JOHNSON. } Appeal from 1st District.

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed.

213 In the Supreme Court of Utah Territory, June Term, 1891.

SATURDAY, *June 13th.*

CORINNE MILL, CANAL AND STOCK COMPANY, Appellant,
vs.
WILLIAM JOHNSON.
} Appeal from 1st District.

In this cause this day, on application therefor by counsel for appellant that the penal sum of a supersedeas bond and bond for costs on removal of this cause by writ of error to the United States Supreme Court be now fixed, it was ordered that the penal sum of said supersedeas bond and bond for costs be, and is hereby, fixed at the sum of one thousand dollars ($1,000).

214 In the Supreme Court of Utah Territory.

THE CORINNE MILL, CANAL AND STOCK COMPANY, Appellant,
vs.
WILLIAM JOHNSON.

Appeal from first district court, H. P. Henderson, judge.

Bennett, Marshall & Bradley, for appellant.
Thomas Maloney, for respondent.

ANDERSON, *J.*:

This is an action by the plaintiff to recover possession of the following-described real estate, situated in Box Elder county, to wit:

Section five (5), township eleven north, of range three west; sections seventeen (17), nineteen (19), twenty-one (21), and twenty-nine (29), in township twelve (12) north, of range three west; the west half of section thirty-three (33) and the southwest quarter of section fifteen (15), in township twelve (12) north, of range three west, Salt Lake meridian.

The complaint alleges that the plaintiff was, on the 8th day of June, 1883, the owner and in possession and entitled to the possession of said real estate, and that on said day the defendant unlawfully and wrongfully took possession of the whole thereof
215 and has ever since unlawfully withheld the possession of the same from the plaintiff. The plaintiff alleges that it has been damaged by the withholding of the possession of said real estate by defendant in the sum of $5,000, and that the value of the rents and profits thereof is one thousand dollars.

The plaintiff prays judgment for the possession of the land in question, for $5,000 damages, and for $1,000 for rents and profits.

The defendant, by his answer, denied all of the allegations of the plaintiff's complaint except that of possession by defendant of the premises in controversy, and pleaded that he and those under whom he claimed had held adverse possession of the land for more than fifteen years next preceding the commencement of the action. As a further answer and by way of cross-complaint the defendant

alleged that in April, 1878, one E. A. Stahn went upon the premises in controversy and made valuable improvements thereon under a contract with the Central Pacific Railroad Company for the purchase thereof, and that Stahn afterwards sold his improvements to the defendant, and that plaintiff obtained its title from said railroad company with notice of and subject to defendant's right, and prayed for a specific performance of this contract against plaintiff or that he have judgment for the value of his improvements.

The cross-complaint was afterward and before trial dismissed by defendant and no evidence was offered in its support. The cause was tried before a jury and there was a verdict and judgment for defendant and the plaintiff brings this appeal.

216 The plaintiff's proof of title consisted of an article of agreement between it and the Central Pacific Railroad Company, dated June 6th, 1883, whereby the railroad company agreed to sell and convey to plaintiff the lands in controversy, together with a large amount of other lands, upon certain terms as to price, time of payment, &c., and upon compliance by plaintiff with the terms of the sale the railroad company was to convey all the lands described in the agreement to which it had acquired or might acquire title from the United States.

The contract by its terms provided that plaintiff should have possession and right of possession of the lands agreed to be sold. The plaintiff also showed the organization of the Central Pacific Railroad Company of California and its consolidation with the Western Pacific Railroad Company on the 22nd day of June, 1870, under the name of the Central Pacific Railroad Company; also the amalgamation or consolidation of the Central Pacific Railroad Company with the California and Oregon Railroad Company, the San Francisco, Oakland and Alameda Company, and the San Joaquin Valley Railroad Company on the 20th day of August, 1870.

Plaintiff also offered in evidence an order from the Commissioner of the General Land Office, dated October 16, 1873, together with a map of the line of the Central Pacific Railroad Co. as definitely located, withdrawing the lands in controversy from entry, the same being within the 20-mile limit of the Central Pacific Railroad Company.

217 The lands in controversy are odd-numbered sections and parts of odd-numbered sections, and it was not disputed at the trial in the court below, nor was it in the argument in this court, that the land lies within the twenty-mile limit of the line of the Central Pacific railroad as it was constructed and is now operated. It was not shown by the plaintiff that any patent for those lands had ever been issued by the United States to the Central Pacific Railroad Company nor to the plaintiff. It was not shown that the lands were not such as were included in the reservations and exceptions contained in the act of Congress of July 1st, 1862, and the various acts amendatory thereof, granting each odd-numbered section within twenty miles of the line of said road as definitely located to the Central Pacific Railroad Company, nor was it shown when the map showing the definite location of said railroad was

filed in the office of the Secretary of the Interior, nor when the railroad was completed.

The court instructed the jury that—

"The plaintiff has undertaken to show here that it has derived title from the Government to the land, but, as a matter of law, gentlemen, I charge you that the plaintiff has failed in that; the proof which he has submitted here of the ownership of these lands on the part of the Central Pacific Railroad Company by grants of Congress is defective—so defective that it does not show title whatever. The acts of Congress that have been put in here were taken from the consideration of the jury, it being my opinion that certain requisites have not been shown—certain things have not been shown
218 as complying with that statute—in order to perfect the title under the grants of Congress. What they are it is unnecessary for me here to state."

This instruction was excepted to, and constitutes the principal assignment of error, as it substantially took the case away from the jury and virtually instructed them to return a verdict for the defendant.

The evidence shows the defendant was in the peaceable possession of the lands in controversy at and before the commencement of this action, and hence, unless the plaintiff could show that it owned the premises, the defendant had the right as against the plaintiff to remain in possession.

The plaintiff claimed to derive its title through the Central Pacific Railroad Company by its contract of purchase with said company. Without stopping to inquire whether this action, which is substantially the same as ejectment at common law, could be maintained upon a contract of purchase where the legal title had not yet vested in the plaintiff, we proceed to inquire whether the party from which it had a contract of purchase had title to the lands in controversy, for the plaintiff could have no greater or better title than the party from which it claimed to have purchased. The evidence failed to show a patent from the Government to any one.

The plaintiff relied upon the act of Congress of July 1st, 1862, (U. S. Statutes at Large, p. 489), and the act of July 2nd, 1864, (U. S. Statutes at Large, vol. 13, p. 356), amendatory thereof, to establish the grant of these lands to the Central Pacific Rail-
219 way Company, of California, and through the several consolidations of that company with other companies to the Central Pacific Railway Company, through and under which it claimed title. If all the odd-numbered sections within twenty miles of the line of the Central Pacific railroad as constructed and operated had been granted to it by the acts of Congress referred to it would have included the lands in controversy, and the evidence would have been sufficient upon proving the railroad company had complied with the requirements of the statute. But by the terms of the act of July 1st, 1862, certain portions of such sections were excepted and reserved from the operation of the grant.

Section 3 of the first-mentioned act contains the following language, to wit: "That there be and is hereby granted to the said

company * * * every alternate section of public land designated by odd numbers to the amount of five alternate sections per mile (changed to ten by section 4, act 1864), on each side of said railroad on the line thereof and within ten (changed to twenty, section 4, act 1864), miles on each side of said road not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have been attached at the time the line of said railroad is definitely fixed; provided that all mineral lands shall be excepted from the operation of this act. * * *

And all such lands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed shall be subject to settlement and pre-emption like other land at a
220 price not exceeding one dollar and twenty-five cents per acre to be paid to said company." The act further provided that the railroad company should, within two years after the passage of the act, designate the route of its road as near as may be and file a map of the same with the Department of the Interior. It will thus be seen that Congress did not grant the whole of each odd-numbered section within the prescribed limits; but only such odd-numbered sections or parts of sections as were not mineral, and as not been sold, reserved, or otherwise disposed of, or were not within any Government reservation, or to which a pre-emption or homestead claim had not attached. Now, it is obvious that if the lands in dispute were included in any of the exceptions or reservations mentioned in these statutes they did not pass by the grant and never became the property of the railroad company nor of plaintiff.

In the case of Mary McGrath *vs.* David G. Tallent (decided at the April session, 1891), this court held that in an action of ejectment by one holding by deed from the Union Pacific Railroad Company of lands granted to it by the acts of Congress referred to, and where no patent had been issued, that it was necessary for the plaintiff to prove a compliance with the statute by the railroad company, and that the lands in dispute were not included in any of the reservations or exceptions mentioned in the statutes in order to maintain the action. See, also, Tarpey *vs.* The Deseret Salt Co., 5 Utah, 494.

221 In this case no evidence having been offered that the railroad ever obtained a patent for the lands in dispute, nor that it filed its map showing its line as definitely located within the time provided by the law, nor any proof as to the time when said railroad was completed, nor that the lands were not within any of the exceptions or reservations provided in the statute, we think plaintiff failed to show its title, and that there was no error in the instruction given by the court to the jury.

The trial court submitted to the jury the issue of the statute of limitations raised in defendant's answer, and this is assigned as error, upon the ground that there was no evidence tending to support this issue. We have examined the evidence contained in the record, and while it does not purport to contain all the evidence in

the case yet from the evidence set out in the printed transcript we think no error was committed in this respect, and the judgment of the district court is affirmed.

We concur:

(Signed) C. S. ZANE, *C. J.*
JOHN W. BLACKBURN, *J.*
JAMES A. MINER, *J.*

Marked: Title of court & cause. Opinion. Filed June 5th, A. D. 1891. Jos. P. Bache, clerk.

222 In the Supreme Court, Utah Territory.

CORINNE MILL, CANAL AND STOCK COMPANY, Appellant,
vs.
WILLIAM JOHNSON, Respondent.

United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October, A. D. 1891, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein The Corinne Mill, Canal and Stock Company is plaintiff in error and you, William Johnson, are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to each of the parties in that behalf.

Witness the Honorable Charles S. Zane, chief justice of the Territory of Utah, this 25th day of June, A. D. 1891.

C. S. ZANE,
Chief Justice of Utah Territory.

To William Johnson and to Messrs. Marsh & Maloney, his attorneys.

223 THE UNITED STATES OF AMERICA, } ss:
Territory of Utah, County of —, }

On the 27th day of June, A. D. 1891, personally appeared W. F. Gill, deputy U. S. marshal for Utah Territory, before me, the subscriber, clerk of the 1st district court in and for the Territory of Utah, and makes oath that he delivered a copy of the within citation to Thomas Maloney, one of the attorneys for the within-named defendant in error, at his office, in Ogden city, Utah Territory, on the 27th day of June, A. D. 1891.

[Seal Territory of Utah, 1st Judicial District, United States of America.]

W. F. GILL.

Subscribed and sworn to before me this 27th day of June, A. D. 1891.

C. H. McCLURE,
Clerk of the 1st District Court.

224 [Endorsed:] Supreme court of Utah. File No., —. Corrine Mill, Canal and Stock Co., pl'tiff in error, *vs.* William Johnson, def't in error. Citation. (Original.) Filed in the supreme court Jun- 25, 1891, at Salt Lake City, Utah. Jos. P. Bache, clerk. Bennett, Marshal & B.

225 In the Supreme Court of the Territory of Utah.

CORINNE MILL, CANAL, AND STOCK COMPANY, Appellant,
vs.
WILLIAM JOHNSON, Respondent.

United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty (60) days from the 25th day of June, A. D. 1891, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein the Corinne Mill, Canal and Stock Company is plaintiff in error and you, William Johnson, are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to each of the parties in that behalf.

Witness the Honorable Charles S. Zane, chief justice of the Territory of Utah, this 30th day of June, A. D. 1891.

C. S. ZANE,
Chief Justice of Utah Territory.

To William Johnson and to Messrs. Marsh & Maloney, his attorneys.

226 TERRITORY OF UTAH, }
County of Weber, } *ss.*

On the 1st day of July, A. D. 1891, personally appeared W. F. Gill, deputy U. S. marshal for the Territory of Utah, before me, the subscriber, clerk of the 1st district court in and for the Territory of Utah, and makes oath that he delivered a copy of the within citation to Thomas Maloney, one of the attorneys for the within-named defendant in error, at his office in Ogden City, Utah Territory, on the 1st day of July, A. D. 1891.

[Seal Territory of Utah, 1st Judicial District, United States of America.]

W. F. GILL.

Subscribed and sworn to before me this 1st day of July, A. D. 1891.

C. H. McCLURE,
Clerk 1st District Court.
By L. B. BEST,
Deputy Clerk.

227 [Endorsed:] Supreme court of Utah. File No. —. Corinne Mill, Canal & Stock Co., pl'tff in error, *vs.* William Johnson, def't in error. Citation. Original. Filed June 30, 1891. Jos. P. Bache, clerk.

228 In the Supreme Court of Utah Territory.

CORINNE MILL, CANAL AND STOCK COMPANY, Plaintiff and Appellant,
vs.
WILLIAM JOHNSON, Defendant and Respondent.

UTAH TERRITORY, } ss:
Salt Lake County, }

Charles W. Bennett, being first duly sworn, on his oath says: At all the times hereinafter named I was and I am now an officer, to wit, the vice-president, of the appellant herein, and at said times I was and I am familiar with and knew and now know the money value of the real estate in dispute herein and involved in this action. Said real estate was, at the time when the judgment was entered in the district court below as well as at the time when the judgment was entered in this court, and is now, of the money value of fifteen thousand dollars.

(Signed) CHARLES W. BENNETT.

Subscribed and sworn to before me this 11th day of June, A. D. 1891.

[SEAL.] N. A. ROBERTSON,
Notary Public Salt Lake County, Utah.

[Endorsed:] Title of court and cause. Affidavit of value of matter in dispute. Filed June 13th, 1891. Jos. P. Bache, clerk.

229 In the Supreme Court of Utah Territory.

THE CORINNE MILL, CANAL & STOCK COMPANY, Plaintiff & Appellant,
vs.
WILLIAM JOHNSON, Defendant & Respondent.

Assignment of Errors on Writ of Error from Supreme Court of the United States.

Now comes the said Corinne Mill, Canal & Stock Company, by its attorneys, C. W. Bennett, John A. Marshall, and William M. Bradley, and says that in the records and proceedings in the above-entitled action in the supreme court of Utah Territory there is manifest error in this, to wit, that the said supreme court of Utah Territory erred in refusing to reverse the judgment of the district court of the first judicial district of Utah Territory on the ground that said court erred in instructing the jury as follows, to wit:

"That the plaintiff has undertaken to show here that it has derived title from the Government to the land. But as matter of law,

gentlemen, I charge you that the plaintiff has failed in that. The proof which he has submitted here of the ownership of these lands on the part of the Central Pacific Railroad Company by grants of Congress is defective, so defective that it does not show title whatever. The acts of Congress that have been put in here were taken from the consideration of the jury, it being my opinion that
230 certain requisites have (2) not been shown, certain things have not been shown, as complying with that statute, in order to perfect the title under the grants of Congress. What they are it is unnecessary for me to state here."

II.

Said supreme court of Utah Territory erred in refusing to reverse the judgment of the said district court of the first judicial district of Utah Territory on the ground that the said district court erred in instructing the jury as follows, to wit:

"Now, you are to determine the question as to whether the ownership of these lands was in the Central Pacific Railroad Company or not. If you should find that it was not, or fail to find that it was, in other words, then you may stop all further consideration of this question and return a verdict in favor of the defendant, and you won't be troubled with that any further; but if you should find by a preponderance of the evidence that the lands did not belong to the Central Pacific Company at the time this contract was made with the Corinne Mill, Canal & Stock Company, then you are to consider the question as to whether the defendant, the persons under whom he claims as his grantors or his predecessors in interest, have been in possession of the land seven years before the commencement of this suit, claiming adversely to the plaintiff or the Central Pacific Railroad Company. It is not sufficient to show that the party has been in possession of the land for seven years, for ten years, or even for twenty years, but it must be shown further that they were in possession claiming title adversely to the plaintiff in that connection, and when that is shown, that they have been in pos-
231 — peaceably and quietly for seven years, claiming the land belonged to them, claiming them adversely to plaintiff, and they claimed they belonged to them under color of title, why, that would be adverse to all the world; then, of course, a statute of limitations may be applied, and the plaintiff could not recover even though he held the lands. You are to consider the testimony in regard to all these questions. This case was commenced in August, 1884. It would be seven years before that that there must be a claim of title adverse to the plaintiff."

Wherefore the said Corinne Mill, Canal & Stock Company prays that the judgment of the supreme court of Utah Territory be reversed, and that the said supreme court of Utah be directed to enter a judgment reversing the judgment of the district court of the first judicial district of Utah Territory.

(Signed) C. W. BENNETT,
" J. A. MARSHALL,
" W. M. BRADLEY,
Attorneys for Plaintiff in Error.

Endorsed: Title court & cause. Assignment of errors & prayer for reversal. Marked filed June 25th, 1891. Jos. P. Bache, 1891.

232 In the Supreme Court of Utah Territory.

CORINNE MILL, CANAL & STOCK COMPANY, Plaintiff & Appellant,
vs.
WILLIAM JOHNSON, Defendant & Respondent.

To the clerk of the supreme court of Utah Territory.

SIR: By reason of error in the return day of the writ of error and citation heretofore issued and served in the above-entitled action, you will please cause a new writ of error and citation to be issued and served, putting a return day therein not to exceed sixty days from the date of the first citation heretofore issued and served, and return both the writs of error and citations, together with proof of service thereof and this praecipe, as a part of your record in the return to the Supreme Court of the United States.

BENNETT, MARSHALL & BRADLEY,
Attorneys for Plaintiff & Appellant.

233 [Endorsed:] Supreme court of Utah. File No. 96. Corinne Mill, Canal & Stock Co., pl'tiff in error, *vs.* William Johnson, def't in error. Praecipe. Filed in the supreme court Jun. 30, 1891, at Salt Lake City, Utah. Jos. P. Bache, clerk.

234 THE UNITED STATES OF AMERICA, } *ss:*
Territory of Utah, }

[Seal Supreme Court, Territory of Utah, United States of America.]

The President of the United States to the honorable judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between The Corinne Mill, Canal and Stock Company, plaintiff and appellant, and William Johnson, defendant and respondent, manifest error hath happened, to the great damage *to* the said Corinne Mill, Canal and Stock Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October, 1891, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

235 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, and the seal of the supreme court of the Territory of Utah this 25th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
Clerk of the Supreme Court in and for the Territory of Utah.

[Endorsed:] Supreme court, Utah. Corinne Mill, Canal & Stock Co., pl'tiff in error, *vs.* William Johnson, def't in error. Writ of error. Original.

236 THE UNITED STATES OF AMERICA, } ss.
Territory of Utah, }

[Seal Supreme Court, Territory of Utah, United States of America.]

The President of the United States to the honorable judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between The Corinne Mill, Canal and Stock Company, plaintiff and appellant, and William Johnson, defendant and respondent, manifest error hath happened, to the great damage *to* the said Corinne Mill, Canal and Stock Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 3rd Monday of August, 1891, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Supreme Court, Territory of Utah, United States of America.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the supreme court of Utah Territory this 30th day of June, A. D. 1891.

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

[Endorsed:] Supreme court of Utah. File No. —. Corinne Mill, Canal & Stock Co., pl'tiff in error, *vs.* William Johnson, def't in error. Writ of error. Original.

237 TERRITORY OF UTAH, } ss.
County of Salt Lake, }

In the Supreme Court of Utah Territory.

CORINNE MILL, CANAL AND STOCK COMPANY, Appellant. *vs.* WILLIAM JOHNSON, Respondent. } Bond on Writ of Error in Supersedeas and for Costs.

Know all men by these presents that we, the Corinne Mill, Canal and Stock Company, a corporation, as principal, and John W. Kerr and Wm. M. Bradley, as sureties, are held and firmly bound unto William Johnson in the full and just sum of one thousand ($1,000.00) dollars, to be paid to the said William Johnson, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of June, A. D. 1891.

Whereas on June 5th, A. D. 1891, the supreme court of the Territory of Utah did make and enter a judgment in the above-entitled
238 action affirming a judgment of the district court of the first judicial district of the Territory of Utah, rendered on February 26th, 1890, in an action then pending in the said court, wherein the above-named Corinne Mill, Canal and Stock Company was plaintiff and the above-named William Johnson was defendant;

And whereas the said Corinne Mill, Canal and Stock Company has obtained a writ of error and filed a copy thereof in the clerk's office of the supreme court of the Territory of Utah to reverse said judgment in the aforesaid suit, and a citation directed to the said William Johnson, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the 12th day of October next;

Now, the condition of the above obligation is such that if the said Corinne Mill, Canal and Stock Company shall prosecute said writ to effect and answer all the damages and costs if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

CORINNE MILL, CANAL AND STOCK COMPANY,
By JNO. W. KERR, *Pres.* [SEAL.]
JNO. W. KERR. [SEAL.]
WM. M. BRADLEY. [SEAL.]

Witness:

239 TERRITORY OF UTAH, } ss.
County of Salt Lake, }

John W. Kerr and Wm. M. Bradley, sureties in the above bond, being first duly sworn, each for himself deposes and says that he

is a resident and freeholder within the county of Salt Lake, in the Territory of Utah, and worth the sum specified in said bond as a penalty therefor over and above all his just debts and liabilities, exclusive of property exempt from execution.

JNO. W. KERR.
WM. M. BRADLEY.

Subscribed and sworn to this 25th day of June, A. D. 1891.
[SEAL.] N. A. ROBERTSON,
Notary Public.

The above bond is by me approved this 25th day of June, 1891.
C. S. ZANE,
Chief Justice.

Marked: Title court & cause. Bond, &c. Filed June 25, 1891. Jos. P. Bache, clerk.

240 UNITED STATES OF AMERICA, } ss:
Territory of Utah, }

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Seal Supreme Court, Territory of Utah, United States of America.

Witness my hand and seal of said supreme court, at Salt Lake City, in said Territory, this 3rd day of July, A. D. 1891.

JOSEPH P. BACHE, *Clerk.*

Endorsed on cover: Case No. 14,727. Utah Territory supreme court. No. 216. The Corinne Mill, Canal and Stock Company, plaintiff in error, *vs.* William Johnson. Filed July 8, 1891.

Office Supreme Court U. S.
FILED.
NOV 14 1894
JAMES H. McKENNEY,
CLERK.

BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 216.

THE CORINNE MILL, CANAL AND STOCK COMPANY,
PLAINTIFF IN ERROR,

vs.

WILLIAM JOHNSON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

C. W. BENNETT,
JOHN A. MARSHALL,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

THE CORINNE MILL, CANAL AND STOCK COMPANY,
PLAINTIFF IN ERROR,
vs.
WILLIAM JOHNSON, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error filed its complaint in the trial court to recover the possession of Sec. 5, T. 11, N. of R. 3 W.; Secs. 17, 19, 21 and 29 in T. 12 N. of R. 3 W.; the W. ½ of Sec. 33 and the S. W. ¼ of Sec. 15, T. 12 N. of R. 3 W., Salt Lake meridian, containing 3680 acres; all of said property being in Box Elder County, Utah Territory and within twenty miles of the Central Pacific Railroad as definitely located.

Defendant's answer denied all of the allegations of plaintiff's complaint, except the ouster and possession by defendant, pleaded the statute of limitations, and by way of cross-complaint and for equitable relief, set up affirmatively that the demanded premises "are all in Box Elder County, Utah Territory and within the twenty mile limit of said railroad (Central Pacific Railroad) and claimed by said railroad as lands contemplated in the said acts of Congress," that as early as April, 1878, one E. A. Stahn, in pursuance of certain public invitations and license of said railroad company, went on said premises and made valuable improvements thereon; that said railroad company had by

public advertisement invited settlers to go upon and improve said land and agreed that such settlers should have the first opportunity to purchase the same at a price to be thereafter agreed upon; that afterwards Stahn sold his improvements to the defendant, who thereupon entered into possession of the premises and that plaintiff obtained its title with notice of and subject to defendant's said rights.

The relief prayed for in this cross-complaint was that the plaintiff as successor in interest to said railroad company be decreed to specifically perform the contract of said company and to convey the premises to defendant on the payment therefor of the graded price placed thereon by said railroad company or in the alternative that defendant be decreed to have a lien on the premises for the value of the improvements placed thereon by him.

Before the trial the cross-complaint was dismissed by the defendant and the case then stood as a law action and was tried before a jury.

The plaintiff claimed title under the Central Pacific Railroad Company (said corporation being a consolidation of the Central Pacific Railroad Company of California, the Western Pacific Railroad Company, and three other railroad corporations) by means of a written contract of purchase, dated April 6th, 1883, which in terms provided that plaintiff should have the possession and right of possession of said premises. (See plaintiff's Ex. 5 Y, Record p. 70.)

The objections raised to plaintiff's title were all objections to the title of the Central Pacific Railroad Company at the time of the execution of the contract with plaintiff, (Ex. 5 Y) and are best stated in the language of the trial court, viz:

> "It seems to me that in proving title to this land, it is incumbent on the plaintiff to show the map of definite location, and when filed, and it is matter of affirmative proof upon their part, that these are not within the excepted kinds of land, that they are not mineral lands, and that they were not lands that were within the pre-emption or homestead right, that that right had not been attached to them, and all that could be shown if it is a fact—what the fact is would be shown by the

record of the land office at Salt Lake City showing that they were open for entry."

(Record p. 28.)

The evidence does not show the date of the definite location of the railroad, nor the date of its completion, but it does show that on October 16th, 1873, the premises in question were by letter of the Commissioner of the General Land Office to the local land officers withdrawn from entry because within the twenty mile limit of the Central Pacific Railroad as "definitely located." A certified copy of such letter together with a certified copy of the plat attached thereto showing the line of definite location of said road and that the demanded premises were within the "twenty-mile limit" were admitted in evidence.

(Plaintiff's Ex. 7 Y, Record pp. 93, 94 and plat.)

That the demanded premises were within the "twenty mile limit" was also averred in defendant's cross-complaint which was introduced in evidence as an admission.

(Record p. 35; Ex. Z, Record p. 99.)

N. P. Anderson, a surveyor, also testified that Section 5, a part of the demanded premises, is within such "twenty mile limit."

(Record p. 12.)

It abundantly appeared that the premises in question were grazing and agricultural land, some of it mountainous, but none of it mineral land.

(Record pp. 14, 15, 16, 27.)

It also appeared that, at the time the suit was instituted, none of the demanded premises had been surveyed and that a portion thereof were still unsurveyed at the time of the trial.

(Record pp. 25, 52.)

Defendant's counsel stated to the court during the progress of the trial that at the time defendant went into possession of the premises, which was in 1882, the lands were unsurveyed.

(Record p. 38.)

Alex. Toponce, a witness for plaintiff, testified that he

had known the demanded premises ever since 1869, and that during that period he had passed by it on an average of once a week, and that there had been no settlement on the land until E. A. Stahn went there.

(Record p. 34.)

Defendant by his cross-complaint alleged that Stahn went on the land in April, 1878, but the defendant testified that Stahn first went on the land May 17th, 1874 (Record p. 35); in either event it was after the definite withdrawal of the land from entry. It also appeared that Stahn left the land and sold his improvements to Southwell in 1881, and prior to the survey of the land; and that Southwell about six months later left the land and sold the improvements to defendant.

(Record pp. 35, 36, 50, 51.)

The plaintiff also introduced in evidence as admissions several cross-complaints filed in this action by defendant, but all of them dismissed prior to the trial in all of which were averments of title in the Central Pacific Railroad Company.

But the court instructed the jury as matter of law, that the plaintiff had failed to show that the Central Pacific Railroad Company had acquired title from the Government to the demanded premises (Record pp. 105-106), and plaintiff's exception to this charge and assignment of error thereon presents it to this court for review.

The court also by its instruction (Record pp. 107-108) submitted to the jury the issue raised by defendant's plea of the statute of limitations, against the objection then interposed by the plaintiff, that there was no evidence tending to support such plea. To this the plaintiff excepted and assigned error thereon. (Record pp. 119-120.)

The case was commenced in August, 1884, and was tried in February, 1890.

SPECIFICATION OF ERRORS.

1st. The trial court erred in instructing the jury as follows:

"The plaintiff has undertaken to show here that it has derived title from the Government to the land. But as matter of law, gentlemen, I charge you that the plaintiff has failed in that. The proof which he has submitted here of the ownership of these lands on the part of the Central Pacific Railroad Company by grants of Congress is defective, so defective that it does not show title whatever. The acts of Congress that have been put in here were taken from the consideration of the jury, it being my opinion that certain requisites have not been shown, certain things have not been shown, as complying with that statute, in order to perfect the title under the grants of Congress. What they are it is unnecessary for me to state here."

(Record pp. 105-106.)

2.—The trial court erred in instructing the jury as follows:

"Now you are to determine the question as to whether the ownership of these lands was in the Central Pacific Railroad Company or not. If you should find that it was not, or fail to find that it was, in other words, then you may stop all further consideration of this question and return a verdict in favor of the defendant, and you wont be troubled with that any further; but if you should find by a preponderance of the evidence that the lands did belong to the Central Pacific Company at the time this contract was made with the Corinne Mill, Canal and Stock Company, then you are to consider the question as to whether the defendant, the persons under whom he claims as his grantors or his predecessors in interest, have been in possession of the land seven years before the commencement of this suit, claiming adversely to the plaintiff, or the Central Pacific Railroad Company. It is not sufficient to show that the party has been in the possession of the land for seven years, for ten years, or even for twenty years, but it must be shown further that they were in possession claiming title adversely to the plaintiff in that connection, and when that is shown, that they have been in possession, peaceably and quietly for seven years, claiming the land belonged to them, claiming them adversely to the plaintiff, and they claimed they belonged to them under color of title, why, that would be adverse to all the world; then, of course, a statute of limitations may be applied, and the plaintiff could not recover even though he held the lands. You are to consider the testimony in regard to all these questions. This case was commenced in August, 1884. It would be seven years before that that there must be a claim of title adverse to the plaintiff."

(Record p. 107.)

POINT I.

The plaintiff in error deraigned good title from the United States through the Central Pacific Railroad Company.

The various acts of Congress material to this case granted land to the Central Pacific Railroad of California, its "associate, successors and assigns." (Sec. 15, Act 1862.)

Act of Congress, approved July 1st, 1862, Sections 3, 4, 5, 6, 9, 10, 11, Statutes at Large, Vol. 12, page 489.

Act of Congress approved July 2d, 1864, Sections 3, 4, 5, 8, 9, 11, 14, Statutes at Large, Vol. 13, page 356.

The exceptions and the conditions precedent to the grant as well as the grant itself, are found in Section 3, 12 Statutes at Large, page 489, as amended by Section 4, 13 Statutes at Large, p. 358, Act of 1864.

Said Section 3 enacts:

> "That there be, and is hereby granted to the said company * * every alternate section of public land, designated by odd numbers, to the amount of five [changed to ten by Section 4, Act of 1864] alternate sections per mile on each side of said railroad on the line thereof, and within the limits of ten [changed to twenty, Section 4, Act of 1864] miles on each side of said road, not sold, reserved or otherwise disposed of, by the United States and to which a pre-emption or homestead claim may not have attached, at the time the line of said railroad is definitely fixed: Provided, that all mineral lands shall be excepted from the operation of this act. [And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturalist to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the pre-emption laws: Provided, that the quantity thus exempted by the operation of this act, and the act to which this act is an amendment shall not exceed one hundred and sixty acres for each settler who claims as an agriculturalist, and such quantity for each settler who claims as a miner, as the said Commissioner may establish by general regulations — Sec. 4, Act of 1864.] * * * And all such land so granted by this section, which shall not be sold or disposed of by said com-

> pany within three years after the entire road shall have been completed shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

That the grant contained in this section was *in praesenti* and not *in futuro* simply is settled by the repeated decisions of this court.

Deseret Salt Co. vs. Tarpey, 142 U. S. 241.
Ryan vs. C. P. R. R. 99 U. S. 385.
Grinnell vs. R. R. Co., 103 U. S. 739.

It is true that at its date the grant was a floating one, but at the time of the location of the road it became definite and annexed itself to the odd sections upon which there was, at that time, no other claim.

The plaintiff in error contends that the evidence shows that a definite location of the railroad was made and a map thereof was duly filed in the Department of the Interior at some date prior to October 16th, 1873, because on that date the Commissioner of the General Land Office definitely withdrew from settlement the land in question because included within the twenty mile limit of the Central Pacific Railroad as "definitely located" and accompanied said order with a plat showing the line of such definite location. As such final withdrawal could only properly follow a definite location of the road, it is strong evidence that a definite location had preceded it and that a map thereof had been filed in the Department of the Interior.

In the case of Weaver vs. Fairchild, 50 Cal., 360, the plaintiff brought ejectment for land within the twenty mile limit of the Central Pacific Railroad claiming under said railroad by mesne conveyances. United States patents had issued both to plaintiff's grantor and to defendant as a pre-emptioner. In that case as in the case at bar there was introduced in evidence a letter from the Commissioner of the General Land Office to the local land officers at San Francisco, withdrawing the land from settlement because within the twenty mile limit of the railroad as definitely located. The court say:

"The case turns on the question, was it proved that the line of the railroad was definitely fixed before the declaratory statement of the defendant, as pre-emptor was offered for filing."

"The seventh section of the Act of July 1, 1862, (amended in the Act of July 2, 1864, by extending the time one year,) provides: 'That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within twenty-five miles of said designated route or routes to be withdrawn from pre-emption, private entry and sale.'

"The Commissioner of the General Land Office is authorized to perform executive duties pertaining to the survey, sale, etc., of the public lands, 'under the direction of the Secretary of the Interior.' (Hestres vs. Brennan, ante, p. 211.)

"It was admitted, in effect, at the trial, that the Commissioner of the General Land Office, by letter of the 31st of July, 1865, addressed to the local land officers, withdrew the land from sale, pre-emption and settlement. The act being within the scope of the Commissioner's powers as a subordinate officer, it will be assumed that the withdrawal was made by direction of the Secretary of the Interior, and the withdrawal is itself a recognition of the fact that the map was filed in the office of the Secretary. We must presume that the proper evidence was before him on which to base his official action."

In Newhall vs Sanger, 92 U. S., 761, Mr. Justice Davis said on page 762:

"The precise date when the Western Pacific Company filed its map is not stated in the record; but we infer that it was between the first day of the December term (1864) of this court and the thirteenth day of February, 1865. At all events the withdrawal for this road was made on the 31st of January, 1865. * * * There can be no doubt, that, by the withdrawal, the grant took effect upon such odd numbered sections of public lands within the specified limits as were not excluded from its operation."

Indeed it is a general rule that if a particular act of an officer of the United States, intrusted with any duty in respect to public lands, would be lawful under any circumstances, the court will presume that the justifying circumstances existed as against a collateral attack.

Moffat vs. U. S., 112 U. S. 24.

Indeed without such evidence under the statute of

Utah Territory the court should have taken judicial notice of the withdrawal of the land from sale by the Department of the Interior, and consequently of all of the facts justifying such withdrawal.

Section 3875, Vol. 2, Compiled Laws of Utah, provides that

> "Courts take judicial notice of the following facts:
>
> * * * *
>
> "2—Whatever is established by law.
>
> "3—Public and private official acts of the legislative, executive and judicial department of this Territory and of the United States.
>
> * * * *
>
> "8—The laws of nature, the measure of time, and the geographical divisions and political history of the world."

Under a similar statute the Supreme Court of Montana held that judicial notice should be taken of the regulations prescribed by the Secretary of the Interior as to the cutting of timber on public lands. The prescribing of such regulations being considered an executive act.

U. S. vs. Williams, 6 Mont., 379.

That the Central Pacific Railroad has been in fact constructed and completed is a part of the political history of this country and within the judicial knowledge of the court.

In the case of C. P. R. R. Co., vs. Dyer, 1 Sawyer, 647, Mr. Justice Field said that the court knew it as a matter of history.

In the case of State vs. C. P. R. R. Co., 20 Nev., 378, the court say:

> "It is a well known fact that the Central Pacific road is and has been completed for a great number of years, and that it has earned and is entitled to receive its patents to the lands granted to it by the above mentioned Acts of Congress, whenever the said company shall pay into the treasury of the United States the costs of surveying, selecting and conveying."

On May 6th, 1870, Congress passed an act to establish the point of junction of the Central and Union Pacific Railroads at Ogden, Utah, in which it recited that such

point was "on the line of railroad as now located and constructed."

16 Stat. at Large, 121.

But evidence that the demanded premises were within twenty miles of the railroad as constructed was introduced at the trial both by the oral testimony of the witness Anderson (Record p. 12) and by the averment of the fact in defendant's various cross-complaints. So that the only matters which plaintiff should have shown, and according to the learned trial judge failed to show, were that at the date of the withdrawal from entry (October 16, 1873), the lands were neither mineral, reserved nor disposed of, and that no homestead, pre-emption, swamp land nor other lawful claim had attached thereto.

The court of course took judicial notice under Section 3875, Laws of Utah, quoted ante, that the lands were not reserved, or disposed of under any special act of Congress except to the railroad company. That they could not have been disposed of, and that no pre-emption, homestead or other lawful claim could have attached thereto under any of the general land laws of the United States and prior to the withdrawal of the lands from sale, follows conclusively from the fact that they were unsurveyed. Indeed, it affirmatively appeared that some of the demanded premises were still unsurveyed at the time of the trial and that the residue were only surveyed after this suit was instituted.

It is well settled that no portion of the public domain, unless it be in the case of a direct grant by Congress, is open to sale until it has been surveyed and an approved plat of the township embracing the lands has been returned to the land office; and that prior to such survey no homestead or pre-emption rights can thereto attach.

Buxton vs. Traver, 130 U. S. 235.

Frisbie vs. Whitney, 9 Wall., 187, 193.

The Yosemite Valley Case, 15 Wall., 77.

The mere entry on and possession of land by one intending to make a homestead entry, and prior to the loca-

tion of the railroad is not sufficient to withdraw the land so possessed from the operation of the grant to the railroad.

Topeka & S. F. R. R vs. Mechlin, 23 Kans., 167.

But in the case at bar it affirmatively appeared that there was no such entry or possession prior to the definite location of the railroad.

To create a right of pre-emption or homestead there must be *settlement, inhabitation* and *improvement.*

Hosmer vs. Wallace, 97 U. S., 575.

Ferguson vs. McLaughlin, 96 U. S., 174.

The testimony of Toponce stated supra, shows at least that from 1869, when he became acquainted with the land, and up to the time Stahn went on the land on May 17th, 1874, there was neither settlement, occupation nor improvement; and Stahn entered into possession after the definite location of the railroad and filed in the railroad land office an application to purchase the land from it.

(Record p. 34.)

Thereafter Stahn sold his improvements to Southwell, and Southwell to defendant in error, and it is by reason of the occupation of these three persons, the one succeeding the other, that it is contended that a valid claim had attached to the entire demanded premises containing 3,680 acres.

That the land was not mineral was abundantly shown by oral evidence. (Record, pp. 14, 15, 16, 27.) That it had not been returned as mineral land is shown by its withdrawal from sale by the Department of the Interior as a consequence of the definite location of the railroad.

The position of the trial court seems to have been that the fact that the land was not excepted from the grant could only be proved by the files of the local land office, and that parol evidence, although admitted without objection, was insufficient for that purpose. It has several times been decided by this court that parol evidence is

competent to show that certain land did or did not fall within the exceptions to similar grants.

Hannibal, etc., R. R. Co. vs. Smith, 9 Wall., 97.

Wright vs. Roseberry, 121 U. S., 496.

It must follow then, we think, that the court erred in taking the question of title away from the jury in the instruction complained of. As the grant to the railroad company was a grant *in praesenti*, and it being once shown that the demanded premises were a part of the land granted, it follows that all of the other conditions imposed thereon are conditions subsequent which do not avoid the title granted unless taken advantage of by the United States or by some one empowered to do so by act of Congress, and that the burden of showing that such forfeiture had been declared or that the breach of the condition subsequent had been taken advantage of is on the person claiming thereunder.

Grinnell vs. R. R. Co., 103 U. S. 739.

Schulenberg vs. Harriman, 21 Wall. 63.

Northern Pac. Ry. Co. vs. Majors, 5 Mont. 111.

But there is no pretense in this case that such forfeiture had or could be declared or that defendant had or could obtain under the land laws of the United States title to more than 3500 acres of land. The judgment in the lower court is predicated not on any claimed right of defendant but on what was thought to be a technical defect of proof on the part of plaintiff in error and held to be sufficient to enable the defendant to invoke the doctrine that the plaintiff must recover in ejectment on the strength of his own title and not on the weakness of that of his adversary.

POINT 2.

The court while instructing the jury that the plaintiff in error had failed to deraign title to the land in controversy through the Central Pacific Railroad submitted to the jury the admissions made by defendant in his various cross-complaints as tending to show some title in the plaintiff and then also submitted to the jury the issue of the statute

of limitations raised in defendant's answer (Record p. 107) although there was literally no evidence in the case tending to support this issue. It appeared that Stahn went into possession of the land in 1874 and in 1881 orally transferred *his improvements*, not the land, to Southwell and that Stahn applied to the railroad company to purchase the land (Record p. 34); that Southwell after remaining on the land for about six months, orally transferred the improvements, not the land, to the defendant, who, when he went into possession of the land, according to his counsel's statement in open court, expected to get title from the railroad company (Record p. 38); and that this action was commenced in July, 1884. The trial court correctly charged the jury that the statutory period in Utah Territory was seven years of adverse possession prior to the institution of the suit.

It was error to submit this issue to the jury. Such submission was in effect a declaration from the court that there was evidence in the case, which, if believed by the jury, would justify a verdict for defendant on that issue.

In 2 Thompson on Trials, § 2315, the rule is laid down by the learned author as follows:

> "The judge instructs the jury hypothetically, upon whatever state of facts, within the limits of the issues, there is evidence tending to prove. It is error for him to submit to the jury a fact or a state of facts, which there is no evidence tending to prove, unless it stands admitted by the pleadings or otherwise; and hence it is of course, not error in any case to refuse such an instruction. The reason is that the giving of such instructions may lead the jury to believe in the existence of a state of facts of which there is no evidence, and to base their finding thereon."

The attention of the trial court was specially called to such defect of evidence at the time of the giving of the instruction. (Record p. 107.)

It is respectfully submitted that the judgment of the Supreme Court of Utah affirming the judgment of the trial court should be reversed and a new trial ordered.

C. W. BENNETT,
JOHN A. MARSHALL,
W. M. BRADLEY,
Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
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JAMES H. MCKENNEY, CLERK

Supreme Court of the United States.

October Term 1894.

THE CORINNE MILL CANAL AND STOCK COMPANY,
Plaintiff in Error,

vs.

WILLIAM JOHNSON,
Defendant in Error.

Case No. 14,727.
Docket No. 216.

BRIEF FOR DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF UTAH TERRITORY.

BRIEF OF
O. B. HALLAM,
Attorney for Defendant in Error.

Supreme Court of the United States.

October Term 1894.

THE CORINNE MILL CANAL AND STOCK COMPANY,
Plaintiff in Error,

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WILLIAM JOHNSON,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

On the record presented it may be entirely unnecessary to enter into any argument on the merits of the case.

MOTION TO DISMISS WRIT OF ERROR.

The supersedeas bond was given, as appears from its recitals (record, p. 123), under the writ of error bearing date June 25, 1891 (p. 121), and conditioned for its effectual prosecution; but that writ was defective as to its return day, and was abandoned by the plaintiff in error's counsel, and a new one ordered by their precipe filed June 30, (p. 121) and a new writ issued (p. 122), that date for the prosecution of which no bond was given. While it may be that a bond might antedate a writ, if conditioned generally for the prosecution of one contemplated in the near future, yet where its conditions are for the prosecution of a writ previously or simultaneously issued and particularly described, it is not a bond for any other writ. Hence the writ now being prosecuted is without bond.

The defendant in error therefore here and now moves that the writ of error be dismissed.

As to the Specification of Errors.

But two errors are assigned by the plaintiff in error as grounds for reversal. Both of these are stated as errors in the trial court in charging the jury. The first is really in the nature of an exclusion of certain evidence, rather than a charge to the jury; and the second is long enough of itself to be a complete charge and conveys several propositions. But it is submitted that the plaintiff in error did not sufficiently except to the charge of the trial court to avail himself of the errors. At the conclusion of the judge's charge it is stated (record, p. 108) that "the plaintiff excepted and excepts to the charge as a whole and to each and every part and portion of the charge separately." This is all the exception that was taken, and has been uniformly and repeatedly held insufficient by this court that a collation or citation of the authorities would only be a work of supererogation. It may be well, however, to call the court's attention to the fact that the decisions of the Supreme Court of Utah are to the same effect.

See—

People *vs.* Berlin, 9 Utah, 383.
Hadra *vs.* Band, *Ibid.* 412.
Marks *vs.* Thompkins, 7 Utah, 421.

The specification of errors therefore lacks a solid foundation on which to rest, and must fall from its own weight,—if it has any.

The Record Does not Purport to Contain all the Evidence.

There is no bill of evidence and exceptions in the record. Apparantly in lieu thereof there is found a paper entitled "Statement on Motion for New Trial and Appeal" be-

ginning on page 8 and ending, presumably, on page 104; or, if it includes the court's charge, on page 108. But this "statement" is not signed by the judge, nor does it even appear to have been filed. Looking through it there is found on page 27 the words "Plaintiff rests," and on page 52 the words "Defendant rests;" but on page 34 it appears that one witness was recalled by plaintiff, and nowhere in the "statement" or at its conclusion is there anything to show that it contains all the evidence; and "where the record upon appeal does not show the whole of the evidence given at the trial it will be presumed upon appeal that every fact necessary to support the judgment was proved at the trial.

Warner vs. Accident Association, 8 Utah, 531.

With a record that is uncompleted as to the evidence given, and in which the trial court's charge to the jury is conclusively presumed to be unobjectionable, it is difficult to see what the plaintiff in error has to offer worthy of this court's consideration. But, if the court should conclude that any further investigation is warranted, we do not fear the result of such on the merits of the case.

What are the Facts?

This is an ordinary action in ejectment to recover 3680 acres of land situated in Box Elder County, Utah Territory. The suit was brought August 16, 1884, in the First District Court at Ogden, and trial was had February 26, 1890, resulting in a verdict for the defendant. Plaintiff in error appealed to the Supreme Court of the Territory, where the case was heard, and June 13, 1891 the judgment affirmed. The opinion of the Utah Supreme Court is found in 7th Utah, 327, also in the present record on page 113.

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The brief of appellant is not a fair presentation of the case. The truth is, the plaintiff in error in no way con-

nected itself with the title to the land, which it is admitted was in the United States.

PLAINTIFF FAILS TO SHOW TITLE.

It was incumbent on the plaintiff to show that it had a good title, such as would support an action of ejectment. This it utterly failed to do. It should have shown that the land in controversy was not within any of the exceptions mentioned in what is called the "Congressional Grant;" that the Central Pacific Railroad Company, within the time specified in the Act of Congress of July 1, 1862, 12 Stats.-At-Large, page 489, C. 120, designated the general route of the road; that it had filed its map of definite location in the Department of the Interior. The Acts of Congress dated July 1, 1862, 12 *supra*, and the Act of July 2, 1864, 13th Stats.-At-Large page 356-357 C. 216, granted only the sections indicated by odd numbers, and such parts of them as were not mineral, and had not been sold, reserved or otherwise disposed of; They expressly provided that the grant should not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim; nor include any government reservation, or mineral lands, or improvements of any *bona fide* settler. Now if the lands in controversy were included in any of these exceptions or reservations of law, they were not granted to the Central Pacific Railroad Company. The truth is the plaintiff offered no testimony sufficiently showing that these lands were not within any of these exceptions or reservations. Without such proof the plaintiff could not recover. It is true the Congressional grants vested the title *in prasenti*, as held by this Court in Deseret Salt Company *vs.* Tarpey, 142 U. S. 241, but this was not so till the "identification of a granted section became so far complete as to authorize the grantee to take possession". In that case patents had issued; in the case

at bar the plaintiff in error shows no patent whatever for any of the lands in controversy. In the last case cited it was shown at what time the map of definite location of the Central Pacific Railroad was filed. It was offered and received in evidence. In the case at bar no such map was offered or shown. In the Record (page 94) a map was offered showing the corrected limits of withdrawal. The withdrawal was to take effect from the date of the definite location of the road; but the definite location of the road is nowhere shown as in Deseret Salt Co. *vs.* Tarpey, *supra*.

There is nothing in the entire record showing that the lands in controversy were actually withdrawn on the Register's and Receiver's Books at Salt Lake; nor is there any evidence that the Register and Receiver ever made the publication required in Commissioner Drummond's letter, (Record, page 84).

Only a Floating Right.

The granted lands were in the nature of a "float" till the line of the road had been definitely fixed; and this route or definite location could not be so fixed till the map of definite location was filed, which, in the case at bar was never shown. The case of Ryan *vs.* R. R. Co., 99 U. S. 382, cited by plaintiff in error, is not in point. In that case a Mexican claim was involved and was declared invalid and finally rejected. After this it was ascertained that there were not enough of the alternate odd sections to satisfy the grant to the R. R. Co., and thereupon the company selected the land in controversy. This selection of the company was approved by the local land officers and approved by the Secretary of the Interior. At the time of the selection there was no Mexican or other claim pending over it. Of course the Railroad Company had a perfect right, under the circumstances, to acquire title to the land. The case of Grinnell *vs.* R. R. Co. 103 U. S.

739, cited by plaintiff in error, construes the Act of Congress of May 15, 1856, C. 28 11. Stats.-At-Large 9, and not the Acts of Congress in controversy. In Newhall *vs.* Sanger, 92 U. S. 761, cited by plaintiff, the United States had issued a patent for the lands in controversy, thereby showing that the R. R. Co. had fully complied with all and every part of the Act of Congress of July 1, 1862. Moreover it is clear that the record in that case showed as a fact that the Western Pacific Company had filed its map of definite location as required by law, but when it was done was not shown. In the case at bar no definine location of the road whatever is shown. Ex. 7 Y only shows, as above stated, the lands withdrawn. The lands in controversy were not shown to have been withdrawn. Counsel for plaintiff cites and relies on Moffatt *vs.* United States, 112 U. S. 24. It is difficult to see for what purpose. In the case at bar there is no collateral attack. The plaintiff does not claim to have, or that it ever had, a patent to any of the lands in controversy. No fraud is charged. We do not controvert any proposition of law laid down in Buxton *vs.* Traver, 130 U. S. 232, cited by plaintiff. As above stated, we strenuously maintain that under the acts of Congress above cited, July 1, 1862 and July 2, 1864, these lands were excepted out of, and from the grant to the Central Pacific Railroad Company. If they were not, then it was the right and duty of the plaintiff to show that these lands were not within any of the exceptions of the said grants.

Defendants Settlement on the Lands.

Stahn and Southwell and Johnson had a perfect right to settle on the lands in controversy and make improvements. If they did so they were protected from the Railroad Co. by said acts of Congress. That they did settle on these

lands and make improvements is abundantly shown in this record (pp. 34–35–34).

"A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. If, within a specified time after the surveys, and the return of the township plat, the settler takes certain steps, that is: files a declaratory statement, such as is required when the surveys have preceded settlement, and performs certain other acts prescribed by law, he acquires, for the first time, a right of pre-emption to the land, that is, a right to purchase it in preference to others." A settler on the public domain is not a trespasser.

Buxton *vs.* Traver, 130 U. S., 235.

Hosmer *vs.* Wallace, 97 U. S., 575.

We repeat and insist that the plaintiff in error must fail in this action for the reason that it has wholly failed to connect itself with the paramount title of the United States.

"And it may be affirmed that it is necessary for a claimant in ejectment to show in himself a good and sufficient title to the land in dispute. The party claiming the right to the lands must recover, if at all, on the strength of his own title, and not on the defects of that of his adversary. This is an elementary principle in the action of ejectment, and it has been reiterated over and over again by the courts. The claimant in the action will not be assisted by the weakness of the defendant's claim, because the possession of the latter gives him a right against every person who can not establish a title. This is the general rule in respect to which there is no exception, and it has been established by a world of authorities, both in this country and England. The party who would change the possession must make out a title upon the strength of what he must recover, if at all."

Tyler on Ejectment and Adverse Enjoyment, 71-72, and numerous authorities there cited.

What the Plaintiff Should Have Shown.

The claim of title shown or attempted to be shown by the plaintiff in error is not such showing as is contemplated or required by the Supreme Court of Utah, and as affirmed by this court in Tarpey *vs.* Deseret Salt Company, reported in 5 Utah, 494, *s. c.*, 17 Pacific Reporter, 631, and affirmed by this court and reported in 142 U. S., 241. In this case the Supreme Court of Utah, with great deliberation, laid down the requirements of this class of cases in a very elaborate opinion prepared by the learned justice who tried this case in the First District Court at Ogden, Utah. The lands sought to be recovered in this action are lands of the same character as those in Tarpey *vs.* Deseret Salt Company, *supra*, and covered by the Congressional grant of July 1, 1862, and July 2, 1864, *supra*. While it is true, as repeatedly decided, that the effect of this congressional legislation or grant was to vest the title *in praesenti*, still there are certain facts to be shown as a *sine qua non* to a recovery of such lands; and in order to recover, the plaintiff must have shown among other things and requisites the following, to wit:

1. That the Central Pacific Railroad Company had selected the lands in controversy at the Land Office in Salt Lake City.

2. That the lands had been surveyed, and that they respectively fell in odd sections, and that the cost of surveying had been paid to the United States.

3. That the United States Surveyor General had made return of the official plat of said surveys, and filed the same in the General Land Office, at Salt Lake City; that being the District in which the lands are all situated.

4. That said lands had been patented by the United States to the Central Pacific Railroad Company.

5. That the said Central Pacific Railroad Company had filed its assent to the said act of July 1, 1862, and a map designating the general route of said railroad with the Secretary of the Interior, within the time set forth by the acts of Congress.

6. That the lands in controversy had been withdrawn from pre-emption, private entry and sale; and this could only be done by introducing the official record, plats and surveys from the land office at Salt Lake City.

7. That the line of railroad was definitely fixed, fully constructed and accepted by the President of the United States, as required by said acts of Congress.

8. That the said lands were agricultural, not mineral or swamp in character, nor covered by any governmental reservation; and not only that the plats had been filed as aforesaid, and reported and showed the land in controversy, but also that said determination, report and showing had continually remained and still remained in full force and effect.

9. That no part of the lands in controversy had been sold, nor had any homestead or pre-emption attached to any part of said lands.

10. It was incumbent on the plaintiff to have shown on the trial in the District Court that no part of the lands in controversy fell within any of the various exceptions mentioned in the acts of Congress, *supra*, or congressional grants.

What it Failed to Show.

The above requisites should have been shown by the plaintiff on the trial of the cause before the jury, in order to make out its title to the lands in controversy. There is nothing in the record showing the map of definite location of the railroad, nor when filed. These requisites are matters of affirmative proof. They should have been proven, if they were true, by the records from the Land

Office at Salt Lake City, and not shown by parol. By the maps, plats and reports on file in the Land Office in Salt Lake City, if such were the facts, the plaintiff could have shown the map of definite location, and when filed, that the lands in controversy were not within the exceptional kinds of lands, that they were not within the pre-emption or homestead right and that those rights had not attached to said lands or any part thereof. The trial judge fully explained these important requisites to plaintiff's counsel. (Record, 27-28). The map, the certificate thereto and the letter from Willis Drummond, Commissioner, as certified to by William J. Sparks, do not show a compliance with the requirements of the statute.

Again, it is respectfully submitted, that the record in this cause does not show, that the Central Pacific Railroad Company, the alleged grantor of the plaintiff in error, is the successor in interest of the various roads and companies, out of which, it is alleged the Central Pacific Railroad Company grew. The recitations in the various charters of incorporation as set forth in the record are not in themselves sufficient to show that the said Central Pacific Railroad Company acquired titles to the lands in controversy covered by the said Act of July 1, 1862 and the amendments thereto.

Plaintiff's Title Only Equitable and Executory.

Again the contract between the said Central Pacific Railway Company and the plaintiff (record, p. 70 *et seq.*) is not a deed of conveyance or a conveyance in fee. It is not even a contract or agreement to convey except on certain contingencies. Plaintiff can not maintain ejectment on such an agreement. By an inspection of said contract or agreement it will be seen that the Railroad Company reserves the right to convey any of the lands therein described to such person or persons as may have acquired

an equitable right to purchase any parcel or tract of said lands (pp. 74 *et seq.*) This being true how can the plaintiff maintain ejectment in this action? For aught that appears in this record the defendant may have acquired such an equitable title or interest in the lands in controversy, that the said railroad company would be compelled by a suit in equity to specifically perform the contract and convey these identical lands to the defendant. And while on this point it may be proper to add, that none of the various cross complaints copied in the record are any part of it, they were not before the court below as pleadings in the trial of this action. The third amended answer and cross complaints and the said third amended cross complaint was on motion of the defendants counsel dismissed April 1, 1889. It will be further remembered, that the plaintiff in this action had never been in the possession of any part of the lands in controversy in this action: defendant and his predecessors in interest were there on the lands and in the actual possession thereof making improvements before the said railroad company had begun to comply with the acts of Congress.

EXTENT OF JUDICIAL PRESUMPTIONS.

Again, reverting to the map and letter and the certificate thereto attached, and marked plaintiffs Ex. 7 Y. (Record, 93-94) the defendant in error contends that such map and letter of withdrawal of said lands from entry and location, etc., must be shown to have been received at the Land Office in Salt Lake City, and that in pursuance thereof the identical lands in controversy were actually withdrawn. There is no such showing in this record.

Again, while it is true, that there are a great many things of which the courts will take judicial knowledge, it

is respectfully submitted, that they will not take judicial knowledge of the necessaries requisite to enable the railroad companies to acquire titles to the lands in controversy. The case of the State *vs.* C. P. R. R. Co., 20 Nev., 372, cited by counsel for plaintiff in error, is a suit to collect taxes, and of course the Nevada court would take judicial notice or knowledge of the facts sufficient to enable it to arrive at its very just conclusion. "Revenue is the life blood of the State". The decision in that case is not at all in conflict with our position in the case at bar. But it is insisted, "that the court of course took judicial notice that the lands were not disposed of or reserved by any special act of Congress except to the Railroad Company". Granting this, would it follow that said lands were or had not otherwise been taken up or disposed of, or were not included in some of the many exceptions of the congressional grants above quoted?

Limitation as Bar.

It is evident from the record in this cause that the defendant and those under whom he claims have been on the lands in controversy and making improvements thereon ever since 1874. Such actual possession and improvements thereon raise presumption of title and will make out a title as against the plaintiff and the Central Pacific Railroad. No one ever claimed title to any part of the lands as against the United States; but if the title to the lands vested *in praesenti* in the railroad company on the 1st day of July, 1862, as contended by counsel for plaintiff in error, then it is submitted that respondent has properly pleaded the statute of limitations, and there is ample proof in the record to support the verdict of the jury and the judgment thereon, and this court will not disturb the finding of the jury.

It is earnestly insisted that if the writ of error is not dismissed the decision of the Supreme Court of Utah should be affirmed.

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George J. Marsh,
of Counsel.